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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 2739 OF 2021

**DONA FOODS BEVERAGES PVT. LTD.PETITIONERS
AND ORS**

V/s.

**KALPATARU RETAIL VENTURES PVT. LTD.RESPONDENTS
AND ORS**

**Mr. Jaydeep Deo i/b Anvil S. Kalekar Advocate for the Petitioners
Mr. Sandeep T. Patil i/b Mr. Suneet Kumar Tyagi for Respondent no.
1.**

CORAM : NITIN W. SAMBRE, J.

DATE: MARCH 14, 2022.

P.C.:

1) In summary suit initiated under Order XXXVII of Code of Civil Procedure, 1908 (Hereinafter referred to as 'the Code' for the sake of brevity) for recovery of arrears of licence fees, prayer of the Petitioners-Defendants for grant of leave to defend came to be rejected vide impugned order passed below exhibit 14. As such this petition.

2) Facts necessary for deciding the petition are as under.

3) Parties hereto were in agreement that there exist a leave and licence agreement based on which, Suit in question being summary suit number 49 of 2018 for recovery of licence fees came to be initiated.

4) Summons for judgment was served on Petitioners-Defendants on 27/06/2018 in response to which they have filed affidavit-in-reply to the summons for judgment on 5/07/2018.

5) After the aforesaid proceedings Petitioners-Defendants took out Application Exh. 14 praying therein, based on pleadings in affidavit opposing summons for judgment, their prayer be also considered for grant of unconditional leave to defend as provided under Order XXXVII Rule 3 (5) of the Code. Said application Exhibit 14 came to be rejected vide impugned order dated 06/03/2021 passed by Jt. Civil Judge Senior Division, Thane, hence this petition.

6) While assailing the said order, counsel for the Petitioners would invite attention of this Court to the provisions of Order XXXVII of the Code. According to him, affidavit objecting summons for judgment was admittedly tendered on 5/07/2018 that is within the time of ten days as stipulated under Order XXXVII Rule 3(5) of the Code. He

would invite my attention to the pleadings in the said affidavit so as to claim that in para 9, 43 and 44, it is specifically mentioned that unconditional leave to defend be granted. According to him, such prayer was made on affidavit. As such there is sufficient compliance of the said provisions. Drawing support from the judgment of this court in the matter of **M/s. Sheth Creators Pvt. Ltd. V/s. Mpower Business Facilitators Ltd.**¹ he would urge that even if Order XXXVII is complete Code, procedure prescribed therein cannot be read to the prejudice of the party like the Petitioners. He would claim that even if Application Exhibit 14 was not supported by an affidavit, the very prayer for grant of unconditional leave to defend is on affidavit which the Court below failed to appreciate. He would further claim that in the aforesaid background, Court below committed an error in passing the order impugned thereby rejecting Application Exhibit 14.

7) While countering the aforesaid submissions, counsel for the Respondent-Plaintiff would urge that provisions of Order XXXVII of the Code are required to be construed strictly even if they are procedural in nature. According to him Order XXXVII Rule 3(5) of the Code in express terms prescribe for independent Application for grant

¹ 2016 SCC OnLine Bom 13755

of unconditional leave to defend to be moved on affidavit and within a period of 10 days from the receipt of suit summons. He would further claim that Application Exhibit 14 was admittedly moved after expiry of aforesaid statutory period of 10 days, which was not supported by an affidavit. He would as such urge that aforesaid defects are not curable. That being so, it is not open for the Petitioners to take the shelter of the affidavit tendered by him on 5/07/2018. Drawing support from the judgment of Delhi High Court in the matters of **M/s. Gaiinda Mull Hem Raj Vs. M/s. Arora Bros. & Others²** and **Ram Labhaya Bhandari V/s. Shiv Parshad³** his contentions are, facts which are pleaded in support of grant of unconditional leave have to be on affidavit as such affidavit is required to be considered for adjudicating the claim for unconditional leave to defend which is absent in the present case. He would further claim that so as to avoid frivolous and vexatious claim, such time period and the procedure contemplated is required to be adhered to.

8) I have considered rival submissions.

9) From the record it can be inferred that the Petitioners were

² [ILR (1972) II Delhi]

³ [AIR (1984) P & H 31]

served with summons for judgment on 27/06/2018, however they have not taken recourse to filing of an independent application as contemplated under Order XXXVII Rule 3(5) of the Code. Rather the Petitioners-Defendants have chosen to initiate proceedings in the form of an affidavit which was submitted on 5/07/2018.

10) Contents of such affidavit as reflected in para 9, 43 and 44 reads thus:

“9. Without prejudice to what is stated herein above I say and submit that therefore I have a good case to defendant this suit and entitled for unconditional leave to defend the suit in view of the facts and circumstances mentioned herein below.

43. In view of the facts and circumstances stated herein above this is a fit and proper case in which in the interest of justice, equity and fair play that this Hon’ble court be please to dismiss the Summons for Judgment taken out by the Plaintiff and unconditional leave to defend the suit be granted to the Defendants.

44. I therefore pray that the summons for judgment taken out by the Plaintiff be dismissed with compensatory cost and unconditional leave to defend the suit be granted to the Defendants the Defendants be allowed to file written statement in

the matter to contest the suit on its merit.”

11) Said affidavit was duly sworn before Notary Public and is brought on record of the Trial Court. Plain reading of the aforesaid contents in the affidavit prima facie demonstrates that the Petitioners have approached the Civil Court dealing with summary suit with a prayer for grant of unconditional leave to defend as contemplated under the aforesaid provisions.

12) Fact remains that no independent Application for grant of leave to defend was moved as said affidavit contain composite pleading viz. grant of unconditional leave to defend and resistance to summons for judgment.

13) During hearing on same Exhibit 14 came to be moved on or about 30/11/2019 praying therein that prayer made in the affidavit for grant of unconditional leave to defend be considered as the one in support of statutory remedy provided under Order XXXVII Rule 3(5) of the Code for grant of unconditional leave to defend.

14) Trial court rejected the same by observing that provisions of Order XXXVII Rule 3(5) of the Code are mandatory in nature and there has to be an independent Application seeking such leave of the

court that too on an affidavit and within the prescribed time.

15) The rules of procedural law are designed to facilitate the process of justice and also have to be considered in aid of delivering justice. By hyper-technically construing such rules, denial of the relief which otherwise a party is entitled having conducted itself in accordance with law cannot be inferred. The Apex Court has already held that procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In the aforesaid backdrop, having noticed that Petitioners have already made a prayer for grant of unconditional leave to defend in their affidavit and that being so, it cannot be construed that there has to be a separate application praying such relief.

16) From the events narrated in foregoing paras, it is noticed that Order XXXVII Rule 3(5) of the Code contemplates filing of an affidavit within ten days from service of suit summons, which, of-course, Petitioners have already tendered in which affidavit they have sufficiently disclosed such facts as were necessary to infer that they

have an intention to seek unconditional leave to defend. Apart from above, sub-rule (6) of Rule 3 provides that for hearing such Summons for Judgment in case if Defendant has not applied for leave to defend or if such application has been made and is refused, Plaintiff i.e. Respondent No.1 is entitled to judgment forthwith. The word “application” used in clause (a) of sub-rule (6) of Rule 3 cannot be stretched to mean that there has to be an independent application and such prayer cannot be moved in affidavit as is contemplated under the aforesaid rules. It appears that once time schedule prescribed under rule 3 of Order XXXVII is adhered to by the Petitioners that too by disclosing their intention that they are asking for conditional leave to defend, Court below, in my opinion, was duty bound to consider the same.

17) Merely because there is composite prayer made in an affidavit objecting Summons for Judgment and seeking unconditional leave to defend cannot be said to be not maintainable within the scheme of Order XXXVII Rule 3 of the Code.

18) As far as the aforesaid observations are concerned, I am very much fortified in my view from the judgment of this court as cited by

the Petitioners in the matter of **M/s. Sheth Creators Pvt. Ltd** [cited supra]

19) The fact remains that from the pleadings in para 9, 43 and 44, it is quite apparent that Respondent-Plaintiff had knowledge about the claim of the Petitioners that they wanted to canvass/exhaust their remedy of seeking unconditional leave to defend in a summary suit and such prayer/pleadings were duly brought before the court on an affidavit. That being so, it cannot be inferred that noncompliance in stricto sense of the procedure as laid down under Order XXXVII Rule 3(5) of C.P.C. i.e by moving a composite prayer, prejudice or substantial loss is caused to the Respondents-Plaintiffs.

- (a) No prejudice is demonstrate.
- (b) respondent / plaintiff has sufficient notice of intention of petitioner/Defendant that too in time prescribe.
- (c) Prayer was moved on affidavit.

20) That being so, order impugned passed below Exhibit 14 is hereby quashed and set aside. Trial court as such is directed to deal with the prayer of the Petitioners for grant of unconditional leave to defend on its own merit and having regard to their pleadings to that effect in the affidavit dated 05/07/2018. However, the aforesaid shall

be subject to cost of Rs. 10,000/- to be deposited in the Trial Court within a period of two weeks from today to which Respondent-Plaintiff will be entitled to withdraw.

21) Petition stands allowed in the above terms.

22) Needless to clarify that Court has not appreciated rival claims on merit and the court below shall decide the claim in the suit so also so in the Application on its own merits.

[NITIN W. SAMBRE, J.]