

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUMMONS FOR JUDGMENT NO. 13 OF 2021
IN
COMM SUMMARY SUIT NO. 2 OF 2021**

First Rand Services Private Limited	...Applicant
In the matter between	
First Rand Services Private Limited	...Plaintiff
Versus	
Pantheon Infrastructure Limited	...Defendant

Mr. Naushad Engineer, a/w Mr. Viraj Parikh, i/b Karansingh
Shekhawat, for the Applicant/Plaintiff.
Mr. Shanay Shah, i/b M/s. Bachubhai Munim & Co., for the
Defendant.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 26th OCTOBER, 2021.
PRONOUNCED ON: 5th JANUARY, 2022

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.3,66,58,175/-, comprising of the security deposit of Rs.1,72,82,430/- in respect of Leave and Licence Agreement dated 12th August, 2016 and a sum of Rs.1,77,97,164/- in respect of Leave and Licence Agreement dated 27th February, 2018, along with interest at the rate of 18% p.a. from 31st May, 2020 till 31st August, 2020 and, future interest at the rate of 18% p.a. on the principal amount of the security deposit from 1st September, 2020 till realization.

2. In response to the writ of summons, the defendant has entered appearance.

3. Thereupon, the plaintiff has taken out this Summons for Judgment.

4. The material averments in the plaint can be summarized as under:

(a) The plaintiff is a company incorporated under the provisions of Companies Act, 1956. It is a licensed financial services provider engaged in the business of providing corporate and investment banking solutions focused on the India Africa Corridor. The defendant is also incorporated under the provisions of the Companies Act, 1956. The defendant is the owner of the office premises on the first floor admeasuring approximately 17,160 sq. ft. carpet area and on the second floor admeasuring approximately 18,785 sq. ft. area, in Tower two of Raiaskaran Tech Park, Phase 2, Marol, Andheri East, Mumbai – 400 072 (the licensed premises).

(b) The defendant had given the aforesaid licensed premises on Leave and Licence basis to the plaintiff by executing two agreements. The first dated 12th August, 2016 (second floor agreement) and the second dated 27th February, 2018 (first floor agreement). Under the terms of agreement dated 12th August,

2016, the plaintiff was to pay security deposit of Rs.1,72,82,430/- to the defendant, which was to be refunded by the defendant to the plaintiff upon expiry of the tenure of the license simultaneously with handing over of the possession of the second floor in good condition (reasonable wear and tear excepted). In the event of default on the part of the defendant to refund the security deposit, the plaintiff was entitled to continue to occupy the second floor without payment of any license fee and also to claim interest on security deposit at the rate of 18% p.a. Clause 4 of the second agreement dated 27th February, 2018 (first floor) contained identical stipulation.

(c) On 1st January, 2020, the plaintiff addressed two letters to the defendant expressing its intention to terminate the agreement with effect from 31st March, 2020. On 9th March, 2020, the plaintiff addressed letters seeking short accommodation and postponement of the date of termination to 30th April, 2020 instead of 31st March, 2020. On 21st April, 2020, the plaintiff sought further extension and postponement of the date of termination to 31st May, 2020. The defendant accepted those requests and the period of license stood extended upto 31st May, 2020.

(d) On 27th April, 2020, the plaintiff addressed a letter to the defendant intimating the defendants of its readiness and willingness to hand over the first floor licensed premises on 30th April, 2020. In response, on 30th April, 2020, the defendant contended that the defendant was not in a position to accept the early termination of the license as both the parties agreed that the period would stand extended upto 31st May, 2020. Pursuant to the invoices raised by the plaintiff for the license fee, in the month of May, 2020, the plaintiff cleared the license fee upto May, 2020.

(e) By a communication dated 6th May, 2020, the plaintiff apprised the defendant that it had already vacated the premises on the first floor on 30th April, 2020 and it was ready to hand over possession thereof and requested the defendant to complete the formalities and return the security deposit of Rs.1,77,99,164/-. By another communication dated 22nd May, 2020, the plaintiff apprised the defendant its willingness to hand over the second floor to the defendant and demanded the refund of the security deposit of Rs.1,72,82,430. Since there

was no response, the plaintiff addressed a reminder on 22nd May, 2020.

5. At that juncture, according to the plaintiff, the defendant deliberately delayed the refund of the security deposit. On 22nd May, 2020, the defendant addressed an e-mail to the plaintiff attaching a snag list of purported damage/missing items/minor defects to the first floor premises. In respect of the second floor premises also, the defendant took no steps to inspect the said premises and ultimately on 20th June, 2020 the defendant addressed an e-mail to the plaintiff attached thereto a snag list of purported damage/missing items/minor defects to the second floor premises. The snag list prepared by the defendant, according to the plaintiff, contained defect/damages to the premises that were only in the nature of reasonable wear and tear, specifically excepted under the terms of the agreement.

6. In order to further delay the refund of the security deposit, the plaintiff avers, the defendant procured quotations absurdly inflating its claim as to repairs and rectification of damages. The initial quotation was for Rs.65,14,000/- for civil/plumbing/electrical works and Rs.11,96,116/- for HVAC works. To add to this, on 20th July, 2020, the defendant addressed an e-mail to the plaintiff claiming that it was entitled to deduct a huge sum

of Rs.1,44,08,819/- from the security deposit. The said claim is completely frivolous and fictitious. The plaintiff has paid the due license fee up to 31st May, 2020. The plaintiff has vacated the licensed premises, though under the terms of the agreement the plaintiff was entitled to hold on to the licensed premises without payment of license fee till the security deposit was refunded. In any event, from the defendant's own showing, the defendant is unjustifiably holding on to the sum of Rs.2,06,70,775/-, even if the claim of the defendant for the sum of Rs.1,44,08,819/- is taken at par. Hence, the plaintiff was constrained to institute this suit for recovery of the entire amount of security deposit along with interest accrued thereon from 31st May, 2020 till the date of the institution of the suit and future interest at the said rate, till realization.

7. The defendants filed an affidavit seeking unconditional leave to defend the suit. At the outset, the defendant contested the tenability of the suit by raising multi-fold grounds. The jurisdiction of this Court to entertain the suit was sought to be questioned on the premise that since the basis of the suit was the Leave and Licence Agreements, the Court of Small Causes at Mumbai had exclusive jurisdiction under the Presidency Small Causes Courts Act, 1882.

8. Secondly, it was contended that the suit was not properly constituted as the person, who has signed and verified the plaint, did not have the requisite authority to institute the suit and file affidavit in support of the judgment. Thirdly, the suit was stated to be not maintainable under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (“the Code”) as it was neither based on debt nor a liquidated demand in money.

9. On merits, the defendant contended that the plaintiff is guilty of suppression of facts. Adverting to the correspondence exchanged between the parties, the defendant has categorically denied that the defendant committed default in either taking possession of the licensed premises or handing over the security deposit. On the contrary, to pre-empt the claim for damages, despite the parties having carried the joint inspection of the licensed premises on 19th and 21st May, 2020, a communication was addressed by the plaintiff on 22nd May, 2020 falsely claiming that no amount was due from the plaintiff to the defendant. The defendant had already addressed an e-mail of even date with a snag list which specified the damage caused by the plaintiff and its personnel to the licensed premises. It was further contended that in the first week of June, 2020, at the behest of the plaintiff, CB Richard Ellis (“CBRE”), an

international Property Consultant, was roped in to determine the extent and costs of rectification of the damage caused to the licensed premises. Based on the advice of CBRE, quotes were invited from various vendors for repairing the damage caused to the licensed premises. The snag list attached to the e-mail dated 22nd July, 2020 was prepared based on joint inspection of the licensed premises carried on 9th June, 2020 by the representatives of the plaintiff company, the CBRE and the defendant. In contrast, the alternative quotations procured by the plaintiff, annexed at Exhibit-P to the plaint, were never shared by the plaintiff with the defendant. The fact that the damage has been caused to the licensed premises and estimates, obtained for repairs thereof, are at variance, itself raises triable issues and, therefore, the defendant is entitled to unconditional leave to defend the suit.

10. The defendant has also made a counter-claim. On account of the default on the part of the plaintiff to rectify the damage caused to the licensed premises, holding on to the licensed premises till 25th July, 2020 and the one months expected period, which was required to rectify the damage, resulting in loss of rent to the defendant, and the loss of interest on the deposit and advance license fee, which the defendant could

have otherwise fetched from the new licensee, the defendant has filed a counter-claim of Rs.3,89,75,850/-. Thus, on account of the genuine and *bona fide* issues, which the defendant claims to have raised, the defendant has sought unconditional leave to defend the suit.

11. An affidavit-in-rejoinder is filed on behalf of the plaintiff to deal with the contentions in the affidavit-in-reply. The defendant followed it with an affidavit-in-sur-rejoinder.

12. In the light of the aforesaid pleadings, I have heard Mr. Engineer, the learned Counsel for the plaintiff and Mr. Shah, the learned Counsel for the defendant, at length. With the assistance of the learned Counsels for the parties, I have perused the material on record including the documents annexed to the plaint and filed by the parties along with the affidavits.

13. To begin with, few uncontroverted facts. The jural relationship between the plaintiff and the defendant as the licensee and the licensor is incontrovertible. Indisputably, the second floor premises was given on leave and licence under the agreement executed on 12th August, 2016. Whereas the first floor premises was given on license under the agreement dated 27th February, 2018. There is not much controversy over the

essential terms of the agreements like the term of the license, the license fee and the stipulation as to the consequences of the default on the part of the parties. Indisputably, the plaintiff has paid the license fee upto 31st May, 2020. The controversy between the parties essentially revolves around the condition of the premises as of the date, the plaintiff claims to have handed over the possession of the licensed premises. The exact date of the delivery of possession of the licensed premises is a matter in issue.

14. At this stage, it may be apposite to note the stipulations in the agreements dated 12th August, 2016 and 27th February, 2018, which govern the aforesaid controversy. Clauses 4 and 21 of the Agreement (second floor) are material and hence extracted below.

“4. Security Deposit:

(a) On or before the execution of this Agreement, the Licensee has deposited with the Licensor a sum of Rs.1,72,82,430/- (Rupees One Crore Seventy Two Lakhs Eighty Two Thousand four Hundred and Thirty only) as and by way of a refundable security deposit (the payment and receipt whereof, the Licensor hereby admits and acknowledges) for the due observance and fulfillment by the Licensee of the terms and conditions of this Agreement (hereinafter referred to as “the Security Deposit”). After the expiry of 36 months from the License Commencement Date, the Security Deposit shall be escalated by 15% on the last paid amount (i.e. from 1st August, 2010) and the same shall be Rs.1,98,74,795/- (Rupees One Crore Ninety Eight Lakhs Seventy Four Thousand Seven Hundred and Ninety Five only).

(b) The Security Deposit shall remain deposited with the licensor throughout the term of this Agreement and shall not carry any interest.

(c) The Security Deposit shall be refunded by the ilcensor to the Licensee on expiry of this Agreement or sooner determination thereof, as the case may be. Simultaneously with the Licensee handing back the Licensed premises in good condition (reasonable wear and tear excepted) to the Licensor. Provided that the Licensor shall be entitled to deduct there from all appropriate and permissible amounts due and owing by the Licensee to the Licensor pursuant to the terms of his Agreement and all amount outstanding and payable by the Licensee in respect of the License premises.

(d) In the event of failure on the part of the Licensor to refund the Security Deposit as aforesaid, the Licensee shall, until the Licensor refunds the entire amount of the Security Deposit, be entitled to continue to use and occupy the Licensed premise without payment to the Licensor of any License fees and such staying over by the Licensee in the Licenses Premise shall not constitute a breach by the Licensee of any term of this Agreement. Without prejudice to the aforesaid and without prejudice to the Licensee's right to take any other appropriate legal proceedings against the Licensor, the Licensee shall be entitled to interest on the Security Deposit at the rate of 18% per annum for the period starting from the time the Licensee was ready and willing to handover charge of the Licensed Premise to the Licensor till actual refund of the Security Deposit by the Licensor.

21. Damage/Loss of Licensed Premises:

If any damage or loss whatsoever is caused to the Licensed Premises or to the said building or any part thereof, by the Licensee and/or its employees, consultants, workmen, contractors, agents, servants, guests or visitors the Licensee shall at its own costs, charges and expenses make good the same to the satisfaction of the Licensor, within 10(ten) days from being required to do so by the Licensors, falling which the Licensor may incur expenditure in this regard on behalf of the Licensee and shall recover the same from the Licensee."

15. Evidently, the parties had agreed that:

- (i) Security deposit shall be refunded by the licensor to the licensee on the expiry of the agreement or sooner determination thereof.

- (ii) The deposit was to be refunded simultaneously with the licensee handing over the possession of the licensed premises in good condition.
- (iii) Reasonable wear and tear were specifically excluded from the loss or damage to the licensed premises.
- (iv) The licensor was entitled to deduct from the security deposit to be refunded, all appropriate and permissible amount due and owed by the licensee to the licensor under the terms of the agreement.
- (v) In the event of default on the part of the licensor to refund the security deposit, the licensee was entitled to continue to use and occupy the licensed premise without payment of any license fee, until the entire amount of security deposit was refunded.
- (vi) Without prejudice to the right to hold on to the licensed premise and any other action, the licensee was entitled to claim interest on the security deposit at the rate of 18% p.a. from the time the licensee was ready and willing to hand over the possession of the licensed premise till the refund of the security deposit.

(vii) If any damage or loss was caused to the licensed premise by the licensee or any person claiming through the licensee, the licensee was enjoined to make good the same to the satisfaction of the licensor at former's costs, charges and expenses within 10 days of being called upon to do so by the licensor.

(viii) In the event of default on the part of the licensee to carry out such repairs/rectification the licensor was at liberty to incur the expenditure for repairs and recover the same from the licensee.

16. In the backdrop of the aforesaid stipulations in the agreement, Mr. Engineer, the learned Counsel for the plaintiff would urge that the endeavour on the part of the defendant to claim that there was damage or loss to the licensed premise, which warranted extensive repairs, was actuated by a design to delay the refund of the security deposit. Inviting the attention of the Court to the communication dated 22nd May, 2020 (Exhibit-N to the plaint) Mr. Engineer would urge that the purported snag list contains many items which can only be said to be part of reasonable wear and tear of the licensed premises. Since such reasonable wear and tear were specifically excluded

by the parties under Clause 4(c), extracted above, the defence sought to be shored up to hold on to the security deposit can neither be said to be fair and reasonable nor *bona fide*.

17. Mr. Engineer would further urge that the claim of license fee for the month of June 2020 is plainly in derogation of the express terms of the contract. Since the plaintiff had shown willingness to hand over the first floor premises by 30th April, 2020 itself and both the licensed premises were vacant as of 31st May, 2020, and the said fact was indicated vide e-mails dated 6th May, 2020 and 22nd May, 2020, the plaintiff cannot be saddled with the liability to pay license fee. On the contrary, on account of the default on the part of the defendant to refund the security deposit, the plaintiff was entitled to charge interest at the rate of 12% p.a. on unpaid security deposit in addition to its right to hold on the licensed premises without payment of license fee, as expressly agreed to by and between the parties under clause 4(d), extracted above. Mr. Engineer further submitted that the counterclaim sought to be made by the defendant is nothing but an exercise to make up the amount which the defendant owes to the plaintiff by raising utterly absurd and untenable claims.

18. In contrast to this, Mr. Shah, the learned Counsel for the defendant, would submit that in the instant case triable issues,

which warrant adjudication, have been raised *bona fide* by the defendant. Mr. Shah, fairly submitted that the defendant, at this stage, does not pursue the technical objections to the tenability of the suit and seeks an unconditional leave to defend the suit on the substantive ground that the defence raised by the defendant is fair and reasonable and cannot, by any stretch of imagination, be said to be moonshine. Laying emphasis on the fact that the CBRE carried out the inspection of the licensed premises, in the presence of the representatives of both the plaintiff and the defendant, to ascertain the damage/loss to the licensed premises and furniture and fixtures thereof and the probable expenses were quantified on the basis of the invoices received from the vendors, Mr. Shah would urge that under the terms of the agreement the defendant was entitled to deduct the amount towards the expenditure for the repairs and rectification. Moreover, from the own showing of the plaintiff, the security guards of the plaintiff were very much on the licensed premises till 25th July, 2020. Thus, the plaintiff cannot be absolved of the liability to pay the license fee for the months of June and July, 2020. In this view of the matter, since the defendant has made a counter-claim, which cannot be said to be frivolous and sham, the issues merit trial, submitted Mr. Shah.

19. In order to bolster up the aforesaid submission, Mr. Shah placed a strong reliance on a Four Judge Bench judgment of the Supreme Court in the case of ***Santosh Kumar vs. Bhai Mool Singh***,¹ wherein the rationale behind the special procedure under Order XXXVII was expounded in the following words:

“8. It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in *Kesavan v. South Indian Bank Ltd.* (ILR 1950 Mad 251), and is examined in greater detail in *Sundaram Chettiar v. Valli Ammal* (1935 ILR 58 Mad 116), to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts.

Now, what is the position here? The defendants admitted execution of the cheque but pleaded that it was only given as collateral security for the price of goods which the plaintiff supplied to the defendants. They said that those goods were paid for by cash payments made from time to time and by other cheques and that therefore the cheque in suit had served its end and should now be returned. They set out the exact dates on which, according to them, the payments had been made and gave the numbers of the cheques.

This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue.”

20. Reliance was also placed on the judgment of the Supreme Court in the case of ***Raj Duggal vs. Ramesh Kumar Bansal***²

1 AIR 1958 SC 321.

2 1991 (1) Supp. SCC 191.

wherein the circumstances in which discretion to grant leave to defend the suit under Order XXXVII ought to be exercised, were enunciated:

“3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.”

21. The legal position as regards the leave to defend in summary suit instituted under Order XXXVII of the Code is fairly crystallized. If the defendant discloses, *prima facie*, fair and reasonable defence, ordinarily, the defendant is entitled to an unconditional leave. In contrast to this, if the defence raised by the defendant appears frivolous, false, or sham the leave to defend shall be refused, and the plaintiff is entitled to judgment. The controversy, however, arises in those matters where there is a doubt as to whether the defendant has raised a triable issue, and the nature of the conditions to be imposed, if the Court comes to the conclusion to grant conditional leave to defend.

There is a significant development in law, especially as regards the grant of leave on the condition as to deposit of the amount in the Court.

22. The law on the aspect of grant of leave was revisited by the Supreme Court in the case of *IDBI Trustship Limited vs. Hubtown Limited*³ and the governing principles were culled out by the Supreme Court. The observations in paragraphs 16 and 17 are instructive and hence extracted below:

“16. It is thus clear that Order 37 has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that *Milkhiram's* case (AIR 1965 SC 1698) is a direct authority on the amended Order 37 provision, as the amended provision in order 37 Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order 37 to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately

3 (2017) 1 SCC 568.

applied by the trial Judge so that justice is done on the facts of each given case.

17. Accordingly, the principles stated in paragraph 8 of *Mechelec* case [(1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in *Milkhiram* case, as follows:

17.1 If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

23. On the aforesaid touchstone, reverting to the facts of the case, the controversy revolves around the nature of the damage

and loss to the licensed premise, furniture and fixtures therein. Mr. Engineer, the learned Counsel for the plaintiff made an earnest endeavour to draw home the point that most of the items in the purported snag list shared along with e-mail dated 22nd May, 2020 would properly fall within the ambit of the term 'reasonable wear and tear'. Mr. Shah controverted the submissions by inviting the attention of the Court to the items in the list appended to the communication dated 20th July, 2020, which was preceded by a joint inspection of the licensed premises by officials of CBRE, in the presence of the representatives of both the parties.

24. From the very nature of the controversy, the question as to whether a particular item included in the snag list shared on 22nd May, 2020 and 20th July, 2020 falls within the ambit of reasonable wear and tear or warrants rectification by the licensee at the cost and expenses of licensee, is essentially rooted in facts. Similarly, the estimate of the expenses for making good the loss or damage and restoring the particular items to its prior position, is again a matter of evidence. To put it in other words, whether the defendant has included items which do not fall within the ambit of loss and/or damage to the licensed premises and amount to reasonable wear and tear and

whether the defendant has allegedly inflated the estimated expenses for the repairs/rectification are the questions which warrant determination on facts.

25. Indisputably, the parties had agreed that the licensed premises would be delivered back to the licensor in good condition. Under Clause 21, the parties had agreed that the licensee would be liable to make good the loss and/or damage to the licensed premise. What was, however, excluded was the loss or damage which could properly be termed to be as a result of reasonable wear and tear of the premises on account of its use. Viewed through this prism, the defence sought to be raised by the defendant that the licensed premises was not handed over to the defendant in a good condition and required extensive repairs, entailing huge expenditure, can be said to legitimately raise a triable issue.

26. The second limb of the defence is the alleged liability of the plaintiff to pay license fee for the period commencing from 1st June, 2020 til 25th July, 2020. This claim is divisible in two parts. First, the license fee for the month of June, 2020. This becomes evident from the communication dated 20th July, 2020. Vide said letter, the defendant professed to deduct a sum of Rs.1,44,08,819/- out of the security deposit towards repairs of

the assets of the premises and one months license fees as the plaintiff was allegedly unable to hand over the licensed premises to the defendant in conformity with the terms and conditions of the agreement. Second, by raising a counterclaim the defendant has sought a sum of Rs.61,74,015/- for the period of one month commencing from 1st July, 2020 to 25th July, 2020, which was allegedly in excess of the agreement between the parties.

27. Mr. Engineer, the learned Counsel for the plaintiff, strenuously submitted that even if the defence of the defendant is taken at par and it is assumed that triable issues are raised in the context of alleged liability to make good the loss and damage and to pay license fee for the month of June, 2020, the defendant is not entitled to hold on to a sum of Rs.2,06,70,775/-. The liability of the defendant to pay the said amount can thus be said to be an admitted liability and, therefore, a decree must follow in the sum of Rs.2,06,70,775/- along with interest at the agreed rate of 18% p.a. under clause 4(d) of the agreement. To contest rest of the claim, the defendant must be directed to deposit the amount in Court, urged Mr. Engineer.

28. Mr. Shah, joined the issue by canvassing a submission that the matter cannot be looked at from such simplistic

perspective, as was sought to be canvassed on behalf of the plaintiff. Since the defendant has raised a genuine and *bona fide* counterclaim, which exceeds or at any rate competes with the claim of the plaintiff, the defendant is entitled to an unconditional leave to defend the suit.

29. Reliance was sought to be placed on a judgment of this Court in the case of *C.A. Galiakotwala and Co. Pvt. Ltd.*⁴ wherein in the context of winding-up petition it was *inter alia* observed that if the company *bona fide* disputes its liability to pay the amount, even though the amount may be a decretal amount, then in that case it can not be said that the company has neglected to pay within the meaning of Section 434 (1)(a). If there is a genuine cross claim, then it implies that the claim of the petitioner is a disputed claim and a disputed claim can never be a good subject matter of a winding up petition. Paragraphs 13 to 15 of the said judgment read as under:

“13. Now, the word “neglected” has not been defined in the Companies Act. However, judicial pronouncements have interpreted the word “neglected” to mean that if there is a refusal to pay without any reasonable cause then it could be said that the company has neglected to pay the amount. The mere omission to pay is not a neglect to pay. If the company *bona fide* disputes its liability to pay the amount, even though the amount may be a decretal amount, then in that case it cannot be said that the company has neglected to pay within the meaning of s.434(1)(a). It is all a question of fact as to whether the company has a *bona fide* dispute and in order to ascertain whether the company has a *bona*

4 1981 SCC Online Bom 383.

fide dispute to the amount claimed by the petitioning creditor, it would be necessary for the court to consider the facts and circumstances of each and to come to a decision whether the company has a bona fide dispute to the claim of the petitioner. If there is a genuine cross-claim, then it amounts to this that the claim of the petitioner is a disputed claim and a disputed claim can never be a good subject-matter of a winding-up petition.

14. In re *L.H.F. Wools Ltd.* [1969] 39 comp Cas 934 (CA), the observations of Lord Denning in Re *Portman Provincial Cinemas Ltd.* [1964] 108 SJ 581 (CA), were quoted with approval. Lord Denning had stated (see p.938 of 39 Comp Cas):

“As I understand the law on the matter, it is this: If this is a genuine cross-claim with substance in it, then let it be tried out in the Queen’s Bench Division: this petition must be rejected. But if there is no substance in cross-claim, then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross-claim.”

15. If the claim of the company “overtops” the claim of the petitioner in the petition, the petition must be dismissed.”

30. Drawing analogy, Mr. Shah would urge that, in the case at hand, the counter-claim raised by the defendant merits being termed as a genuine and *bona fide* cross claim and, therefore, the defendant deserves an unconditional leave to defend the suit.

31. Assailing the correctness of the aforesaid proposition, Mr. Engineer stoutly submitted that it is not an immutable rule of law that the moment the defendant raises a counterclaim, he is entitled to an unconditional leave to defend the suit. On the contrary, the stage of counterclaim would arrive only when the Court grants the defendant leave to defend the suit. A defendant thus cannot be permitted to circumvent the rigour of

the provisions contained in Order XXXVII by simply making out a counterclaim howsoever baseless and absurd it may be, urged Mr. Engineer. To buttress the aforesaid submission, Mr. Engineer placed reliance on the judgments of this Court in the cases of *Suraj Sanghi Finance Ltd. vs. Credential Finance Ltd and others*⁵ and *Elegant Capitals Pvt. Ltd. vs. In Cablenet (Andhra) Ltd.*⁶

32. In the case of *Suraj Sanghi* (supra), a learned Single Judge dealt with a submission that a summary suit would not be maintainable where the counterclaim has been filed and accepted. Repelling the submission, the learned Single Judge observed as under:

“5. It is lastly contended that as the counter claim has been filed and has been accepted the suit as Summary suit would not be maintainable. Order 37 contemplates a specific procedure. The first step in the procedure is for plaintiff to file suit and cause summons to be served for appearance. Within the time stipulated appearance has to be filed. It is on filing of the appearance that the plaintiff thereafter have to take out summons for judgment and serve it on the defendants. It is only at the stage when the Court grants leave conditional or unconditional to contest the suit that the stage of filing written statement arises. A counter claim can be filed along with the Written statement. Therefore, merely because a counter claim has been filed, would not detract or result in the suit filed as summary suit being treated as regular suit. Even otherwise the counter claim was not taken on record by any speaking order. The issue was not in issue before the Court. It was not for consideration before the Court. Therefore, merely accepting the same, to my mind is of no consequence. In the instant case, the counter claim is for damages. It is not yet an ascertained amount or "debt". To my mind, therefore, it is

5 2002(4) MhLJ 770.

6 2012(1) MhLJ 962.

not material for the purpose of considering the amount to be deposited in the event Court has to grant conditional leave. The Apex Court has settled the law that damages are not debt as decided in *Union of India v. Roman Foundry*, AIR 1974 SC 1265. That contention must also be rejected.”

33. In the case of *Elegant Capitals* (supra), following the aforesaid judgment in the case of *Suraj Sanghi* (supra), another learned Single Judge rejected the submission advanced on behalf of the defendant therein that the defendant is entitled to an unconditional leave on the ground that it may file a counterclaim against the plaintiff.

34. I find substance in the submission of Mr. Engineer. If the contention on behalf of the defendant that the defendant is entitled to an unconditional leave to defend the suit since the defendant has raised a counterclaim is accepted, the very object of providing summary procedure under Order XXXVII of the Code would be rendered otiose. It is one thing to contend that, while seeking leave to defend the suit, the defendant has raised a counterclaim which raises a substantive defence or at any rate triable issues. It is a completely different thing to assert that since the defendant has raised a counterclaim, irrespective of the nature and quality of the defence and/or counterclaim, the defendant is entitled to an unconditional leave to defend the suit. It all turns upon the quality of the defence raised by the defendant. The tests enunciated by a catena of decisions and

reformulated in the case of *Hubtown* (supra) are required to be applied even in a case where the defendant raises a counterclaim. An unconditional leave cannot be granted on the sole premise that the defendant has raised a counterclaim.

35. Re-adverting to the facts of the case, it is imperative to note that under clause 4(d), in the event of default on the part of the licensor to refund the security deposit, the licensee was entitled to retain the possession of the licensed premises, without payment of license fee and in addition thereto as well as any other remedy available in law, claim interest at the rate of 18% p.a. What is of material significance is the fact that the interest was to be paid from the time the licensee was ready and willing to hand over possession of the licensed premises to the licensor. Conversely, Clause 21 only gave the licensor the right to recover the expenditure incurred in carrying out the repairs and rectification of the damage from the licensee. If these stipulations are considered in the light of the fact that the plaintiff had communicated its readiness and willingness to hand over the licensed premise by 30th April, 2020 (first floor) and both the floors by 30th May, 2020, the plaintiff would have been justified in holding on to the licensed premise till the

refund of the security deposit, without payment of the license fee.

36. In the aforesaid view of the matter, the question as to whether the plaintiff was liable to pay the license fee for the period from 1st June, 2020 to 30th June, 2020, even if assumed to be a matter for trial, is such that leave to defend can only be granted upon deposit of the amount of license fee which was sought to be deducted by the defendant in Court. The nature and extent of damage/loss to the licensed premises and estimated costs of the repairs and rectification required to be borne by the plaintiff are again matters of evidence and trial.

37. The situation which thus obtains is that no triable issue seems to have been raised as regards the liability to refund the amount of Rs.2,06,70,775. Triable issues are raised as regards the entitlement of the defendant to deduct the amount towards the expenses of repairs and claim for license fee.

38. At the hearing of the summons for judgment, where the Court finds that a part of claim deserves to be decreed and leave to defend is required to be granted in respect of rest of the claim, it is open to the Court to pass a decree for a part of the claim and grant unconditional or conditional leave to defend the suit in respect of the rest of the claim. A profitable reference, in

this context, can be made to a Full Bench Judgment of this Court in the case of *SICOM Ltd. vs. Prashant S. Tanna and others*,⁷ wherein the legal position was summarized, *inter alia*, as under:

“28. (1)

(2) In a summary suit filed under Order XXXVII of the Civil Procedure Code, the plaintiff is entitled at any time to abandon or give-up a part of the claim unilaterally. This, the plaintiff may do by making a statement to be recorded by the Court and without the necessity of the plaintiff making a formal application for the same by withdrawing the summons for judgment, amending the plaint and thereafter taking out a fresh summons for judgment or otherwise.

(3) At the hearing of the summons for judgment, it will be open to the Court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.

(4) At the hearing of the summons for judgment, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the defendant failing to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted.”

39. Applying the aforesaid principles to the facts of the case, the summons for judgment is required to be made absolute so far as the sum of Rs.2,06,70,775/- along with interest at the agreed rate of 18% p.a. from 31st May, 2020 till realization. Conditional leave is required to be granted as regards the amount which was sought to be deducted by the defendant towards the expenses for repairs and rectification of loss and

⁷ 2004(2) Mh.L.J. 292.

damage to the licenced premises, furniture and fixtures therein and the claim for license fee for the month of June, 2020 subject to deposit of the sum of Rs.1 Crore in Court.

40. Hence, the following order:

: O r d e r :

- (i) The summons for judgment is made partly absolute.
- (ii) The defendant do pay a sum of Rs.2,06,70,775/- along with the interest at the rate of 18% p.a. from 31st May, 2020, till realization, to the plaintiff.
- (iii) A decree be drawn and sealed expeditiously.
- (iv) Leave to defend the suit in respect of the rest of the claim is granted to the defendant subject to deposit of a sum of Rs.1 Crore in Court within a period of six weeks from today.
- (v) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file its written statement within a period of four weeks from the date of deposit.
- (vi) If this conditional order of deposit is not complied with within the aforesaid stipulated period the plaintiff shall be entitled to apply for an *ex-parte*

decree against the defendant, after obtaining a non-deposit certificate, from the Prothonotary and Senior Master of this Court, regarding balance claim as well.

The Summons for Judgment stands accordingly disposed of.

[N. J. JAMADAR, J.]