

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

SUMMONS FOR JUDGMENT NO.28 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO.280 OF 2019

Maharashtra State Road Development
Corporation Limited ...Plaintiff

vs.

Amit Jagannath Shetty and Another ...Defendants

Mr. Tanmay Vispute a/w. Mr. Tapan Agarwal, Mr. J. Kapadia, Ms.
Juhu Parekh i/b. Little & Co., for the Plaintiff.
Mr. Ashutosh Gole, for the Defendants.

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CORAM : N.J. JAMADAR, J.
RESERVED ON : AUGUST 18, 2022
PRONOUNCED ON : NOVEMBER 9, 2022

JUDGMENT:

1. This Commercial Division Summary Suit is instituted to recover a sum of Rs. 2,19,80,214 along with further interest @ 18% p.a from the date of institution of the suit till payment and/or realization based on a written contract and acknowledgments of liability.

2. Shorn of unnecessary details the material averments in the plaint can be stated as under:

a] The plaintiff is a limited liability company incorporated under the Companies Act, 1956. It is a Government company within the

meaning of section 617 of the Companies Act, 1956. The plaintiff is engaged in the business, inter alia, of improving and developing integrated transport infrastructure and other public utility activities, within the state of Maharashtra. The defendant No.1 is the proprietor of, "Hotel Pooja". The defendant No. 2 is a joint signatory to the agreement executed between the parties.

3. In the year 2013 the plaintiff had invited offers for leasing out a built up food mall situated at Taje, Tal. Maval, Dist. Pune along Yashwantrao Chavan Expressway for a period of 10 years. The lease period was subsequently enhanced to 12 years. The defendant No. 1 submitted an offer. The defendant No.1's offer was accepted vide a letter of acceptance dated 5th February, 2014. The defendant No. 1 had offered to pay first yearly upfront compensation of Rs. 1,09,31,333/- and a subsequent yearly compensation with a 10% increase over the previous year's compensation, together with service tax as applicable. The defendants paid first yearly upfront compensation of Rs. 1,09,31,333/-, performance security of Rs. 54,65,666/- and a security deposit of Rs. 21,86,227/-, on 3rd March, 2014. Thereupon, on 4th March, 2014 an agreement came to be executed between the plaintiff and defendant Nos. 1 and 2. The agreement inter alia provided for payment of upfront yearly

compensation for the subsequent years with 10% increase over the previous year's compensation, recovery of dues as land revenue, termination of the agreement for various defaults including default in payment of any amount payable to the lessor under the contract for a period of 30 days after due date, charge of compensation @ 3 times the monthly lease rent for holding over the leased premises after the termination of the lease till the handing over of the leased premises to the lessor.

4. In accordance with the terms of the agreement, the defendants were bound and liable to pay the second yearly compensation along with service tax and deposit an increased amount towards performance security on or before 15th February, 2015. However, the defendants failed and neglected to pay the second yearly lease rent of Rs. 1,20,24,666/-, service tax of Rs. 14,86,224/- and deposit performance security of Rs. 5,46,567/-. The plaintiff called upon the defendants vide letter dated 20th March, 2015 to make the aforesaid payment. There was an exchange of correspondence, during the course of which, the defendants, whilst acknowledging the liability, sought concessions and accommodation in making the said payment. Few of the cheques drawn by the defendants were also dishonoured. Eventually, vide letter dated 25th

January, 2016 the plaintiff informed the defendants that as of 20th January, 2016 after accounting for the payment made by the defendants, an amount of Rs. 96,30,233/- was still due and payable by the defendants to the plaintiff. The defendants were categorically put to notice that in the event of default in payment of any of the balance 5 cheques drawn for Rs. 90 lakhs, the plaintiff would be constrained to take action in accordance with the terms and conditions of the agreement including termination of contract and also for dishonor of the cheques.

5. In the meanwhile, the third yearly compensation amount became due and payable, on 14th February, 2016. The defendants failed to pay the said installment. Third of the 9 post dated cheques drawn by the defendants was also dishonored. Therefore, vide letter dated 1st March, 2016 the plaintiff terminated the agreement with effect from 30 days of receipt of the said letter. Further correspondence was exchanged wherein also the defendants categorically admitted the liability to pay the outstanding amount. However, defendants continued to commit default in payment. Eventually, the plaintiff took over the possession of the leased premises on 13th October, 2016. The defendants thus became liable to pay compensation at 3 times the agreed rent for the period

beyond the date of termination of the contract. The defendants were also liable to pay interest @ 18% p.a. on the outstanding amount. As of the date of the suit, a sum of Rs. 2,19,80,214/- became due and payable by the defendants to the plaintiff. Hence, the plaintiff was constrained to institute the suit for recovery of the said amount based on the written contract and the acknowledgment of liability in the correspondence exchanged between the parties.

6. The defendant No. 1 appeared in response to the service of the Writ of Summons. Thereupon, the plaintiff took out a Summons for Judgment.

7. An affidavit in reply is filed on behalf of defendant No. 1 seeking an unconditional leave to defend the suit. At the outset, the defendant No. 1 has assailed the tenability of the suit for non compliance of the mandatory requirement of pre-institution mediation under section 12A of the Commercial Courts Act, 2015. Since the suit came to be instituted on 21st December, 2018 after the Amendment Act, 28 of 2018 came into force with effect from 3rd May, 2018, the bar under section 12A operates and in the absence of pre institution mediation, the plaint is liable to be rejected on the said count. Secondly, the agreement dated 4th March, 2014 is not adequately stamped and therefore cannot be acted upon. Thirdly,

since the agreement dated 4th March, 2014 created an interest in the immovable property, it cannot be read in evidence for want of registration. Therefore, such an inadequately stamped and unregistered instrument cannot be the basis of a summary suit. Fourthly, the suit is not maintainable as summary suit as the claim for compensation at 3 times the agreed rent for the alleged holding over is in the nature of penalty and beyond the purview of Order XXXVII of the Code.

8. On merits, it was contended that in accordance with the terms of the agreement, the defendant No. 1 has paid the yearly compensation, security deposit and service tax for first year. The defendant No. 1 contends that though the defendant No. 1 was made to part with the said amount, yet the plaintiff failed to hand over clear and vacant possession of the leased premises. The predecessor lessee continued to squat over the leased premises. The defendants could not operate the food mall or renovate it as the predecessor lessee continued to occupy a portion of the leased premises. Despite relentless persuasion, the plaintiff did not make any diligent efforts and eventually the actual possession of the entire structure could be handed over to the defendants on 30th August, 2015. Thus, according to the defendant, it was the plaintiff who was in breach of

contract and thus not entitled to claim compensation and other charges for the period for which the defendants were not put in possession of the leased premises.

9. As regards the second yearly compensation, the defendants claimed to have paid a total sum of Rs. 4,27,86,312/- during the period March, 2014 to August, 2016. The defendants were made to incur expenses of Rs. 70 lakhs towards renovation of part of the food mall. In any event, according to the own showing of the plaintiff only an amount of Rs. 96,30,223/- was due and payable to the plaintiff as of 20th January, 2016. Even after the alleged termination, the defendants were coerced to pay a sum of Rs. 51,50,000/- to the plaintiff on the assurance that the said termination would be withdrawn. Yet, the plaintiff did not withdraw the termination notice. The defendants have thus paid more amount to the plaintiff than due for the year 2015-16.

10. The defendant Nos. 1 and 2 further contend that the claim of the plaintiff that the defendants acknowledged the liability, in the correspondence exchanged between the parties, is unsustainable as those communications were addressed by the defendants in desperation after recording the circumstances which the

defendants were made to encounter. Therefore, the alleged admissions in the said letters cannot be read in isolation and torn out of context. As a substantial part of the plaintiff's claim is in the nature of penalty for the alleged holding over the leased premises, the defendant Nos. 1 and 2 are entitled to an unconditional leave to defend the suit.

11. An affidavit in rejoinder is filed on behalf of the plaintiff controverting the contentions in the affidavit in reply.

12. I have heard Mr. Vispute, the learned counsel for the plaintiff and Mr. Ashutosh Gole, learned counsel for the defendants at some length. With the assistance of the learned counsel for the parties I have perused the averments in the plaint, affidavit in support for Summons for Judgment, affidavit in reply and rejoinder thereto and the documents placed on record.

13. Mr. Vispute, the learned counsel for the plaintiff submitted that the defendants have incurred the liability under a written contract i.e. agreement dated 4th March, 2014. In accordance with the terms of the contract, the defendants were liable to pay upfront yearly compensation at the agreed rate along with performance security and services charges. Laying emphasis on the

correspondence exchanged between the parties, especially letters addressed on behalf of the defendants, Mr. Vispute would urge that the liability is not only borne out by the written contract but also clearly acknowledged. Attention of the Court was invited to the letter dated 19th April, 2017 wherein the defendant No. 1 undertook to pay the outstanding dues of Rs. 1,97,53,296/-, the letter dated 11th September, 2017, wherein the defendant No. 1 acknowledged that as of 3rd August, 2016 there was an outstanding balance of Rs. 4,72,17,741/-, the letter dated 8th December, 2017 whereby difficulty was expressed by defendant No. 1 to pay the outstanding amount of Rs. 1,50,00,000/- as the food mall was shut and the letter dated 20th December, 2017 whereby the defendant No. 1 assured to pay the outstanding amount once the termination is revoked. In the face of these acknowledgments, according to Mr. Vispute, there is no defence to the plaintiff's claim.

14. In opposition to this, Mr. Gole, learned counsel for the defendants submitted that the entire claim of the plaintiff is egregiously exaggerated and inflated. According to Mr. Gole, the lease commenced on 15th March, 2014 and by the own showing of the plaintiff, it stood terminated with effect from 31st March, 2016. There is no controversy over the payment of Rs. 1,99,34,380/- for

the first year. For the second year, a sum of Rs. 1,40,57,457/- became due and payable. As against this, according to Mr. Gole, the defendants have paid a sum of Rs. 2,28,51,933/- (paragraph 22 of the affidavit in reply). Any demand for the period post termination of the agreement would be in the nature of damages. A summary suit would not be maintainable for recovery of damages, urged Mr. Gole.

15. On the aspect of the alleged acknowledgment of the liability, Mr. Gole canvassed a two-fold submission. First, the communication addressed by defendant No. 1 must be read as a whole and it would be impermissible to resort to selective reading to infer an admission. Secondly, if the entire tenor of the correspondence addressed by defendant No. 1 is considered, it becomes evident that the defendant No. 1 had all along been raising the grievances about the non-delivery of the leased premises immediately after the execution of the agreement and failure to grant permission to renovate the leased premises within time. In any event, a summary suit can not be based on a mere acknowledgment of a debt. According to Mr. Gole, the claim for compensation at three times of the agreed rent would clearly be in the nature of penalty, for the recovery of which a summary suit is not maintainable.

16. I have given a careful consideration to the aforesaid submissions.

17. To start with, it may be apposite to note in-controvertible facts. There is not much controversy over the fact that pursuant to invitation of bids to operate the food mall, the defendants had made an offer and a letter of acceptance dated 5th February, 2014 was issued and, evidently, the Lease Agreement came to be executed on 4th March, 2014 between the plaintiff and defendant Nos. 1 and 2. The agreement, inter alia, provided that for running the food mall the lessee would pay upfront lease rent of Rs. 23,37,58,727/- for 12 years. The agreement also provided for payment of performance security @ 50% of the yearly compensation agreed upon between the parties. Performance security was to be refundable within two months of the expiry of the contract period. Clause 19 provided that the unpaid amount shall carry interest @ 18% p.a. In addition, for due observance and performance of terms and conditions of the agreement, the lessee had to pay Rs. 21,86,267/- towards security deposit. The said deposit was not to carry any interest. Clause 29 provided for termination of the lease, inter alia, on the ground of default on the part of the lessee in making payment of any amount under the contract for a period of 30 days after the due date.

Though the parties are at issue over the exact date on which the entire leased premises was delivered to the defendants by the plaintiffs, yet there is not much controversy over the fact that the compensation, service charges and performance security for the first year were paid by the defendants to the plaintiff. The controversy between the parties revolves around the alleged default in payment of the compensation, enhanced performance security and service charges for the subsequent years.

18. Before adverting to deal with the contentious issue, it may be appropriate to consider the challenge to the tenability of the suit for non compliance of the provisions contained in section 12A of the Commercial Courts Act, 2015. Banking upon the pronouncement of Division Bench of this Court in the case of Deepak Raheja vs. Ganga Taro Vazirani¹, it was urged on behalf of the defendants that the provisions contained in section 12A of the Commercial Courts Act, 2015 have been held to be mandatory and non-compliance thereof would necessarily entail the consequence of rejection of the plaint.

19. This challenge need not detain the Court any more. With the pronouncement of the Supreme Court in the case of Patil Automation Private Limited and Others vs. Rakheja Engineers

1 (2021) 6 Bom CR 115

Private Limited² the controversy can be said to have been put at rest. The Supreme Court has declared that the provisions of section 12A of the Commercial Courts Act, 2015 are mandatory in nature. However, the Supreme Court has made the said declaration prospective in operation. It is further provided that if the jurisdictional High Court had declared the provision of section 12A mandatory, the plaintiff would not be entitled to the benefit of said prospective declaration as the situation would then be governed by the pronouncement of the jurisdictional High Court.

20. In the case at hand, since the suit was instituted on 20th February, 2019 and the Division Bench declared the law in the case of **Deepak Raheja** (supra) on 1st October, 2021, the bar under section 12A of the Commercial Courts Act, 2016 would not operate and, therefore, the challenge on the said count to the tenability of the suit does not merit countenance.

21. To appreciate the challenge to the claim on the ground that it is in the nature of enforcement of penalty clause, it maybe necessary to note that in the particulars of the claim, the plaintiff chose not to divulge the requisite details. During the course of the submission, however, the plaintiff tendered a chart, indicating the

2 2022 SCC OnLine SC 1028.

amount which according to the plaintiff became due and payable by the defendants under the various heads. It indicate that as of 30th March, 2015 a sum of Rs. 1,90,83,193/- was outstanding under various heads. It further indicates that for the period between 31st March, 2016 (the date the Lease Agreement came to be terminated) and 13th October, 2016 (the date the plaintiff claimed to have taken over the possession of the leased premises), the compensation is claimed at thrice the lease rent. It would be imperative to note that the plaintiff acknowledges that the aggregate amount received from the defendants and the appropriated security deposit comes to Rs. 4,36,83,731/-.

22. The learned counsel for the plaintiff has fairly assisted the Court by placing on record two charts which indicate that as of 20th December, 2018, without compensation at thrice the agreed rent, a sum of Rs. 49,88,557/- becomes due and payable and, with compensation, a sum of Rs. 2,19,80,214/- becomes due and payable.

23. From the aforesaid particulars of the claim of the plaintiff, it becomes abundantly clear that a major component of the plaintiff's claim comprises the compensation at thrice the agreed rent for the occupation of the leased premises by the defendant post termination

of the agreement i.e. beyond 31st March, 2016.

24. The relevant part of clause 20 under the heading “Re-entry” reads as under:-

20} Upon the expiry or the sooner termination of this agreement, the Lessee shall be deemed to have been divested of all rights and privileges under this contract and they shall hand over vacant and peaceful possession of the said premises to the Lessor along with immovable structures, additions, permanent fixtures and permanent facilities and the said new building as it is to the Lessor and the Lessee shall not claim any compensation for the cost incurred by it for the same during the contract period. On failure to do so, the Lessee shall be liable to pay to the Lessor compensation at the rate of three (3) times of the monthly lease rent to be calculated on the basis of the upfront lease rent till the said premises are vacated and handed over to the Lessor.

25. What is the import of the aforesaid clause ?

26. Mr. Vispute, the learned counsel for the plaintiff would urge that the liability to pay the compensation at the enhanced rate is a contractual liability. It is in the nature of a liquidated debt. The parties had entered into the contract being fully cognizant of its import and consequences. Therefore, at this stage, the defendants cannot be heard to urge that the clause is in the nature of penalty.

27. In opposition to this, Mr. Gole would submit that the aforesaid

stipulation is clearly in the nature of the penalty, which is expressly excluded by sub clause (ii), clause (b) of sub rule (2) of Rule 1 of Order XXXVII of the Code. At any rate, according to Mr. Gole, the claim is in the nature of damages and cannot be a subject matter of a summary suit.

28. I am persuaded to agree with the submissions of Mr. Gole. The stipulation that upon failure to handover the possession of the leased premises post termination *‘the lessee’ would be liable to pay compensation at thrice the agreed rent* is clearly in *terrorem*. *Whether the aforesaid clause is a “reasonable pre-estimate of the damages” or partakes the character of “penalty”, surely raises a triable issue.*

29. Reliance placed by Mr. Gole on the judgment of a Division Bench of this Court in the case of Karim Hussainali Wajawalia and Another vs. Origin Information Technology (India)³ appears to be well founded. In the said case, the second defendant had entered into a contract with the plaintiff undertaking that the first defendant will abide by the contract and in case the first defendant failed to complete the training or left the service in breach of contract, he would be liable to pay an amount of Rs. 5 lakhs to the

³ 2008(4) Mh.L.J. 937.

plaintiff as liquidated damages. Relying on the said clause, the plaintiff instituted a summary suit as the first defendant had left service without completing the training period. The Division Bench held that the principal question which required consideration was, as to whether such type of suit can be instituted by resorting to Order XXXVII of the Code. After extracting the provisions contained in the sub rules (1) and (2) of Rule 1 of Order XXXVII of the Code, the Division Bench observed, inter alia, as under:-

5. In our view, so far as the claim for damages is concerned, the plaintiffs are required to prove its case by leading evidence in order to substantiate that they have suffered damages for particular amount. In our view, suit for damages, therefore, cannot be instituted by way of a summary suit and the plaintiffs are required to move the Court by way of a regular suit wherein, after appreciating the evidence on record, the Court has to adjudicate the claim and to find out the actual loss or damages suffered by the plaintiffs. Even if it is held that the first defendant has left the services without completing the training, yet, the plaintiffs are required to prove the actual damage suffered by it for getting damages towards such abandonment of service by first defendant. So far as Section 74 of the Contract Act is concerned, it may be true that in terms of the said provision, in a given case, the Plaintiffs may not be required to prove the actual damages. It cannot be said that by virtue of Section 74 of the Contract Act, summary suit of this nature is maintainable under Order 37 of the Code, as maintainability of summary suit is required to be considered in the light of the provisions contained under Order 37 of the Code. So far as reference to Section 74 of the Contract Act is concerned, it is for the plaintiffs to rely upon the same in a suit by leading proper evidence in this behalf. At this stage we are not expressing our opinion on this aspect of the matter but we are satisfied from the averments in the plaint

that the suit in the present case is not maintainable as a summary suit under Order 37 of the Code. Simply because, according to the plaintiffs, there is an ascertained sum of damages for which they have filed the suit is no ground for bringing the suit as a summary suit. It is a special remedy provided only in certain type of transactions as provided under Order 37 of the Code. We are, therefore, of the view that the suit in question is not maintainable as a summary suit under Order 37 of the Code and the remedy available to the plaintiffs is to move the regular suit. Considering this aspect, we set aside the impugned order and decree and remand the matter to the learned single Judge.

6. Considering the aforesaid, in our view, the defendants are entitled to get leave to defend the suit unconditionally and accordingly, while setting aside the order and decree of the learned single Judge, we grant unconditional leave to the defendants to defend the suit.

30. The matter can be looked at from a slightly different perspective. The aforesaid stipulation of payment of compensation at thrice the agreed rate of rent for holding over the leased premises, is essentially a measure for determination of damages.

31. In the event of a breach of contract under section 73 of the Indian Contract Act, 1872, the party who suffers damage on account of the breach of contract is entitled to receive compensation for any loss or damage caused to him, which the parties knew when they entered into the contract to be likely to result from the breach thereof. Section 73 is required to be read in conjunction with section

74 of the Contract Act which deals with a situation where a sum is named in the contract as the amount to be paid in case of such breach or any other stipulation by way of penalty. The party complaining of the breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated. It is imperative to note that section 74 emphasizes that in case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation whether or not any loss is proved to have been caused by such breach. The entitlement for a reasonable compensation is thus underscored. If the compensation named in the contract is in the nature of penalty, a party is entitled to reasonable compensation for the loss suffered. On the contrary, if the compensation named in the contract appears to be a genuine pre-estimate of loss which was in the contemplation of the parties while entering into the contract, proof of loss or damage is not peremptory. The party complaining of breach would then be justified in claiming the sum so named.

32. A useful reference in this context can be made to a judgment of the Supreme Court in the case of **Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Limited**⁴ wherein the principles which govern the award of damages in case of breach of contract were culled out as

4 (2003) 5 Supreme Court Cases 705.

under:-

68. From the aforesaid discussions, it can be held that:-

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in [Section 73](#) of the Contract Act.

(3) [Section 74](#) is to be read along with [Section 73](#) and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

33. Mr. Vispute, the learned counsel for the plaintiff urged with a degree of vehemence that the plaintiff's claim is also based on clear and un-equivocal acknowledgment of liability reflected in the correspondence addressed by the defendant No. 1. Undoubtedly, in the letter dated 19th April, 2017, the defendant No. 1 had agreed to pay the outstanding dues of Rs. 97,56,296/- as soon as the food mall become ready. Likewise, in the letter dated 11th September, 2017 the defendants acknowledged the balance of Rs. 47,21,741/- as of 3rd

August, 2016 and in the letter dated 8th December, 2017 the defendants expressed difficulty in paying the outstanding amount of Rs. 1,50,00,000/- as there was no generation of income from the food mall and in the letter dated 20th December, 2017, defendant No.1 agreed to pay the outstanding amount no sooner the termination was revoked.

34. However, the aforesaid admissions/ acknowledgment, if they can at all be termed so, are required to be read in the context of the entire setting of the matter. The defendants were desperate in getting the termination of the lease agreement revoked. The defendants adverted to the circumstances of delayed delivery of possession of leased premises and hindrances in renovation of the leased premises for want of approval. Revocation of the termination was sought as that would have enabled the defendants to raise finance. It is in these circumstances, the defendant No. 1 offered to make the payment. It would be impermissible to read those admissions in isolation and torn out of context

35. The situation which thus obtains is that if the component of compensation is excluded from consideration, for the moment, as against the total dues claimed by the plaintiff as of 20th December,

2018 (comprising of interest @ 18% p.a.) aggregating to Rs. 4,86,72,288/-, the defendants have paid a sum of Rs. 4,36,83,731/-. From this stand point, the defences raised by the defendants, especially the challenge to the entitlement of the plaintiff to recover compensation for the period beyond termination of the Lease Agreement, at thrice the agreed rate of rent, cannot be said to be sham or vexatious. The defendants have, thus, raised triable issues.

36. A useful reference in this context can be made to the judgment of the Supreme Court in the case of **B.L. Kashyap and Sons Limited vs. JMS Steel and Power Corporation and Another**⁵ wherein the Apex Court held as under:-

33. It is at once clear that even though in the case of IDBI Trusteeship, this Court has observed that the principles stated in paragraph 8 of Mechelec Engineers' case shall stand superseded in the wake of amendment of Rule 3 of Order XXXVII but, on the core theme, the principles remain the same that grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the Court.

33.1 As noticed, if the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable issues indicating a fair or bonafide or reasonable defence, albeit not a positively

5 (2022) 3 SCC 294

good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.

33.2 Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

33.3 Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in

exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.

37. In view of the aforesaid exposition of law reverting to the facts of the case, in my view, the defendants are entitled to an unconditional leave to defend the suit.

Hence, the following order:

ORDER

- a] Unconditional leave to defend the suit is granted to the defendants.
- b] Defendants shall file written statement within 30 days from the date of this order.
- c] Summons for Judgment stands dismissed.

(N. J. JAMADAR, J.)