

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION (L) NO.8886 OF 2021
IN
SUMMONS FOR JUDGMENT NO.1 OF 2020
IN
NOTICE OF MOTION NO.2243 OF 2019
IN
COMM. SUMMARY SUIT NO.1168 OF 2019**

Manish Waman Ambre ... Applicant
and
K.G.Millennium Realtors Pvt. Ltd. And Ors. ... Plaintiffs
versus
M/s. Samarth Erectors & Developers and Ors. ... Defendants

**WITH
INTERIM APPLICATION NO.1932 OF 2022
IN
INTERIM APPLICATION (L) NO.8886 OF 2021
IN
SUMMONS FOR JUDGMENT NO.1 OF 2020
IN
NOTICE OF MOTION NO.2243 OF 2019
IN
COMM. SUMMARY SUIT NO.1168 OF 2019**

Mr. Milan Desai i/by T.R.Patel, for Applicant.

Mr. Kevic Setalvad, Sr. Advocate with Mr. S.D.Shetty, Ms. Vimal Khandare i/by
M.V.Kini and Co., for Org. Plaintiffs.

CORAM : N. J. JAMADAR, J.

**RESERVED ON : 29 SEPTEMBER, 2022
PRONOUNCED ON : 31 JANUARY 2023**

ORDER :

1. The Applicant/Original Defendant No.3 has preferred this Application

to set aside the order and decree dated 17 March 2021 passed by this Court in SJ 1 of 2020 in COMSS No.1168 of 2019, whereby and whereunder the Summons for Judgment came to be allowed by passing a decree in terms of prayer clause (a) in the sum of Rs.18.57 Crores along with interest @ 18% p.a. from 7 May 2018 till payment and/or realization.

2. The background facts leading to this Application can be stated as under :

2.1 K.G.Millennium Realtors Pvt. Ltd. (K.G.Millennium) – Plaintiff No.1 is a company incorporated under the provisions of the Companies Act, 1956. Plaintiff No.2 is the director of Plaintiff No.1. Plaintiff No.2 was the manager of Plaintiff Nos.1 and 2 for the purpose of day to day supervision of the building construction project undertaken in partnership with Samarth Erectors & Developers (Samarth) – Defendant No.1 firm. Defendant Nos.2 to 5 are the partners of Samarth.

2.2 Based on the representations of the Defendants, K.G.Millennium agreed to develop a property at Andheri (E), Mumbai in partnership with the Defendants. A Memorandum of Understanding dated 12 November 2014 came to be executed between Plaintiff Nos.2 and 3, on the one part, and the Defendants, on the other part. In accordance with the said MOU, Plaintiff Nos.2 and 3 were to be admitted as partners of Samarth.

2.3 Plaintiff Nos.2 and 3 were to contribute a sum of Rs.10 Crores in the said project. Profits were to be shared between Plaintiff Nos.2 and 3 and the Defendants

in the ratio of 32% : 68%. Pursuant to the said MOU, a Deed of Admission into Partnership came to be executed on 22 November 2014. Plaintiff Nos.2 and 3 were to have 22% and 10% share in the profits, respectively.

2.4 A fresh MOU came to be executed between the parties on 21 January 2015, whereunder the Defendants acknowledged to have received a sum of Rs.4 Crores from the Plaintiffs towards the capital. MOU further recorded that there would be a minimum net profit of Rs.17.31 Crores in the said development project and it would be shared in accordance with the profit sharing ratio i.e. 32% : 68%. The Defendants agreed to share the profit at the said rate of 32% aggregating to Rs.22.50 Crores by the end of 24 months from 1 February 2015.

2.5 In the minutes of meeting dated 20 July 2015, the Defendants agreed and acknowledged receipt of Rs.6.85 Crores from the Plaintiffs. Remaining amount of capital of Rs.10 Crores, to be contributed by the Plaintiffs, was agreed to be paid as per the modified timelines. This was followed by a fresh MOU executed in the month of September, 2016, whereunder the Defendants acknowledged to have received a sum of Rs.7 Crores. The share in the profits of the Plaintiffs was reduced to 22.40% aggregating to Rs.15.75 Crores. It was further agreed that the Plaintiffs would be entitled to minimum share of profit of Rs.15.75 crores.

2.6 In the wake of default on the part of the Defendants to pay the profits as agreed, a further MOU was executed on 29 July, 2017 whereby and whereunder the

Defendants agreed to pay an amount of Rs13.35 crores within a period of six months from 29 July 2017. Since the Defendants did not comply with the undertaking in the MOU, further negotiations ensued and, eventually, a Settlement Agreement came to be executed on 7 May 2018.

2.7 Under the Settlement Agreement, the Defendants acknowledged liability to pay to the Plaintiff Nos.2 and 3 a sum of Rs.19.25 Crores. It further recorded that the parties arrived at a settlement to provide that a lumpsum amount of Rs.13.35 Crores be paid by the Defendants to Plaintiff Nos.2 and 3. Stipulations were made for payment of the said amount of Rs.13.35 Crores in installments. Cheques were drawn in discharge of the said liability. The Defendants further agreed that, in the event of two consecutive defaults, the Settlement Agreement shall be deemed to have been breached and, thereupon, Plaintiff Nos.2 and 3 shall be entitled to recover the entire amount of Rs.19.25 Crores along with interest @ 18% p.a. on the outstanding amount from 7 May 2018.

2.8 The Defendants again committed default in payment of the amount in accordance with the terms of the Settlement Agreement. Hence, the suit for recovery of the amount of Rs.19.25 Crores along with interest thereon on the basis of the written contract contained therein.

3. The Defendants appeared in response to the service of the Writ of Summons. The Plaintiffs took out a Summons for Judgment. An Affidavit in Reply

came to be filed on behalf of the Defendants seeking unconditional leave to defend the Suit.

4. The Defendants assailed the tenability of the Suit on the ground that the first MOU dated 12 November, 2014 and the 2nd MOU dated 19 February 2015 provide for a dispute resolution mechanism. All the disputes between the parties were to be referred to and resolved by arbitration. In addition, according to the Defendants, Deed of Retirement which came to be executed between the parties pursuant to the Settlement Agreement also contained an arbitration clause (Clause 22), mandating the resolution of the dispute through arbitration. Thus, the Suit instituted, without invoking arbitration, deserves to be dismissed on the said count alone.

5. Secondly, the Defendants contend that the subject matter of the suit is plainly and essentially a partnership dispute and the project has yet not been completed. Accounts were yet to be settled. In the circumstances, a summary suit based on the Settlement Agreement for settling the partnership dispute, is not tenable.

6. Thirdly, the Plaintiffs had invested a sum of Rs.6.85 Crores only, as against the agreed amount of Rs.10 Crores. Failure on the part of the Plaintiffs to bring further amount adversely affected the development of the project. In any event, according to the Defendants, Settlement Agreement does not amount to written contract within the meaning of Order XXXVII Rule (1) (2) of the Code of Civil

Procedure, 1908. Therefore, the Defendants were entitled to an unconditional leave to defend the Suit.

7. Upon completion of pleadings, the Summons for Judgment came to be listed before the Court for hearing on 15 March 2021. None appeared for the Defendants. The learned Single Judge of this Court, after considering the pleadings and material on record, was persuaded to allow the Summons for Judgment and pass a decree in the sum of Rs.18.57 Crores along with interest @ 18% p.a. after allowing the credit for the sum of Rs.68 Lakhs which were stated to have been paid by the Defendants to the Plaintiff Nos.2 and 3, in the intervening period.

8. The Court noted that there were only two defences raised to seek leave to defend. First, MOU and Partnership deed contained arbitration clause. Second, the Settlement Agreement did not constitute a written contract. Both the defences were found unworthy of consideration. Since the Defendants had not preferred an Application under Section 8 of the Arbitration and Conciliation Act, 1996, the defence of existence of an arbitration agreement was found to be of no consequence. The Court further found that the Settlement Agreement dated 7 May 2018, in fact, constituted a written contract within the meaning of Order 37 Rule (1) (2) of the Code. Thus, there was not even a statable defence to warrant leave to defend the Suit.

9. The Defendants preferred the instant application purportedly under Order 9 Rule 13 to set aside the decree contending, inter alia, that on account of the ill

health of the then Advocate on record for the Defendants, none appeared before the Court when the Summons for Judgment was taken up for hearing and a decree came to be passed. It was further contended that the Advocate on record of the Defendants was unaware of the listing of the matter before the Court on 15 and 17 January 2021. Since the Defendants had diligently pursued the matter by filing Affidavit seeking leave to defend and they have a strong case on merits, the decree deserves to be set aside, lest the Defendants would suffer an irreparable loss.

10. I have heard Mr. Desai, learned counsel for the Applicant and Mr. Setalvad, Senior Advocate appearing for the Plaintiffs. With the assistance of the learned Counsel for the parties, I have perused the pleadings and the documents placed on record, including the order passed by this Court on 17 March 2021.

11. To start with the challenge to the tenability of the Application. Mr. Setalvad strenuously submitted that an Application under Order 9 Rule 13, like the present one, to set aside the decree passed under Order 37 of the Code is not a proper remedy. Inviting the attention of the Court to the provisions contained in Rule 4 of Order 37, Mr. Setalvad urged that the provisions contained in Order 37 Rule 4 which empower the Court to set aside the decree passed under the said Order are quite distinct from the parameters which govern the setting aside of an ex-parte decree under Order 9 Rule 13 of the Code.

12. To draw home this point, Mr. Setalvad placed a strong reliance on a

judgment of the Supreme Court in the case of *Rajni Kumar vs. Suresh Kumar Malhotra and another*,¹ wherein a distinction between the provisions contained in Order 9 Rule 13 under Order 37 Rule 4 of the Code was illuminatingly postulated :

“8] A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit :

- (i) to stay or set aside execution and
- (ii) to give leave to the defendant (a) to appear to the summons and (b) to defend the suit.

9] The expression 'special circumstances' is not defined in the Civil Procedure Code nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

... ..

1 (2003) 5 SCC 315.

11] It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9. “

13. The Supreme Court has thus enunciated that when the defendant seeks setting aside of a decree passed in a summary suit by invoking the provision contained in Order XXXVII Rule 4, two conditions are required to be satisfied. First, it is incumbent upon the defendant to demonstrate, “special circumstances” which merit

setting aside of the decree. Second, there is a further obligation on the defendant to satisfy the Court that the facts of the case are such that he is entitled to leave to defend the suit. This additional requirement stems from the legislative policy of not permitting a defendant in a suit under Order XXXVII to defend the suit as a matter of right.

14. Indeed in the instant application, the Defendant expressly seeks setting aside of the decree under Order 9 Rule 13 of the Code. However, that cannot be the sole reason to throw the Application overboard. It is trite an inaccurate reliance on a particular provision with reference to which relief is sought, may not be of decisive significance. What has to be considered is whether a case for setting aside of the decree in accordance with the governing provisions is made out.

15. On the first count, it is the case of the Defendants that they could not appear before the Court on 15 and 17 March 2021 as their Advocate was unwell. Mr. Desai would urge that March 2021 was a tumultuous time as the second wave of Covid-19 Pandemic was playing havoc in different parts of the country, in varying degrees. It is in the backdrop of this situation, according to Mr. Desai, the inability of the Defendants to appear before the Court when the decree was passed, needs to be appreciated.

16. I find substance in the submission of Mr. Desai. Viewed through this prism, the contention on behalf of the Defendants that the learned Advocate for the

Defendants could not proceed with the matter as he was unwell, cannot be brushed aside lightly. Though the provisions contained under Order 9 Rule 13 do not apply to set aside a decree passed under Order 37, yet in the matter of consideration as to whether there was sufficient cause for the Defendants not to appear before the Court when the decree was passed, the approach expected of the Court while considering an Application therein, equally informs the approach in an application under Order 37 Rule 4 of the Code.

17. The term ‘sufficient cause’ must receive a liberal consideration so as to advance the cause of substantive justice. The Court cannot be influenced by indolence or negligence on the part of the Defendants, in the past, and must consider sufficiency of the cause for non-appearance on the day on which the decree came to be passed. The fact that the Defendants approached the Court to set aside the decree within a reasonable time of passing of the decree, by ascribing justifiable reasons, is also a relevant consideration in the exercise of discretion.

18. A useful reference in this context can be made to the observations of the Supreme Court in the case of **G.P.Srivastava V/s. R.K.Raizada and Ors.**² wherein the approach expected of the court while dealing with an application for setting aside of decree was delineated. Paragraph 7 reads thus :

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the

2 2000 (3) SCC 54

Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex- parte proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits".

(Emphasis supplied)

19. The aforesaid pronouncement, if considered in the backdrop of the exigency of the situation, which arose on account of C-19 Pandemic, renders the cause ascribed by the Defendants for non-appearance on the day the decree came to be passed, justifiable. Two factors bear upon the exercise of discretion. First, the Defendants had already filed an Affidavit seeking leave to defend the Suit by raising multiple defences. Second, the application for setting aside the decree came to be filed under 8 days of the passing of the decree. This vouches for the diligence and bonafide of the Defendants. I am, therefore, persuaded to hold that the Defendants have succeeded in demonstrating that there was a sufficient cause for non-appearance.

20. Mr. Setalvad urged with a degree of vehemence that even if the Court was to hold in favour of the Defendants on the count of sufficient cause for non-appearance, no case for setting aside the decree is made out as the Defendants miserably failed to satisfy the pivotal test of existence of 'special circumstance' to set aside the decree. It is not enough for the Defendants to demonstrate that the Defendants were prevented from appearing before the Court by a sufficient cause, but the Defendants are further enjoined to show by an Affidavit or otherwise the facts which would entitle them to leave to defend the suit, urged Mr. Setalvad.

21. Banking upon the enunciation of law in the case of **Rajni Kumar (supra)**, Mr. Setalvad would urge that the Affidavit in Reply fails to make out a

defence, much less a substantial, fair or reasonable one warranting grant of leave to defend. In any event, according to Mr. Setalvad, while passing the order sought to be set aside, this Court had ascribed justifiable reasons in repelling the twin defences of existence of arbitration agreement and non-existence of a written contract and, therefore, there is now no justification for setting aside the decree.

22. In opposition to this, Mr. Desai stoutly submitted that the Plaintiffs case suffers from the vice of deliberate suppression of material facts. The Plaintiffs did not deliberately refer to the deed of retirement executed by and between the parties on 7 May 2018, under which Plaintiff Nos.2 and 3 stood retired from the Defendant No.1 firm. Mr. Desai further urged that the deed of retirement also contains an arbitration clause (clause 22). Yet the Plaintiffs, with an oblique motive, based the suit on the Settlement Agreement.

23. According to Mr. Desai, in the face of the deed of admission into the partnership firm and the deed of retirement, real dispute between the parties essentially arises out of the partnership agreement. This itself, according to Mr. Desai, raises a triable issue. Secondly, the suit is not properly constituted in as much as K.G.Millennium, a Corporate entity, was never a partner of Samarth – Defendant No.1. Nor K.G.Millennium is a party to the Settlement Agreement dated 7 May 2018. In the circumstances, the Summary Suit seeking a decree in favour of the Plaintiff No.1 as well is not tenable.

24. Thirdly, Mr. Desai made an endeavour to draw home the point that, even on the merits of the claim, since Plaintiff Nos.2 and 3 did not invest the entire amount of Rs.10 Crores, and what the Plaintiffs seek is the share in the estimated profit and not actual profit, the alleged liability of the Defendants to pay the amount in accordance with the Settlement Agreement is debatable. Therefore, the Defendants are entitled to an unconditional leave to defend the Suit.

25. On the aspect of the existence of an arbitration clause, it is pertinent to note that the deed of admission dated 12 November 2014 contained an arbitration clause (clause 13), MOU dated 19 February 2015 also provided for dispute resolution through arbitration (clause 16) and, as noted above, deed of retirement dated 7 May 2018 contained an arbitration clause (clause 22). In contrast, the Settlement Agreement dated 7 May 2018, on the strength of which the Plaintiffs have instituted Summary Suit, does not contain an arbitration clause.

26. The question as to whether arbitration clauses contained in the Deed of Admission dated 12 November 2014 and the Deed of Retirement dated 7 May 2018 govern the disputes which arise out of the Settlement Agreement as well, does not arise for consideration as evidently the Defendants have not applied under Section 8 of the Arbitration and Conciliation Act, 1996 for a reference before submitting their first statement on the substance of the dispute. Instead the Defendants contend that the suit is liable to be dismissed on account of the said arbitration clause. This plea of the

Defendants is plainly unsustainable.

27. Equally untenable is the defence that the Settlement Agreement does not constitute a written contract within the meaning of Order 37 Rule 1 (2). It would be suffice to extract few clauses of the Settlement Agreement dated 7 May 2018 in which the parties have also narrated the history of the transactions and how the terms of the agreement between the parties came to be progressively modified :

“1) Parties of the First and Second part have now mutually agreed and arrived into a settlement for payment of the aforesaid sum of Rs.19.25 Crores, for lump sum amount of Rs.13.35 Crores and on payment of the said settled sum of Rs.13.35 Crores, the party of the Second part shall admit and confirm that the amount of Rs.19.25 Crores has been fully paid for lump sum amount of Rs.13.35 Crores being the full and final settlement amount and on execution of this MOU the party of the second part shall also execute the deed of retirement from the partnership firm and after execution hereof the party of the second part being retiring partners shall have no claim against the continuing partners and/or then existing partners and/or partnership nor have any liability of whatsoever nature either to the said partnership Firm or arising under the said Partnership Firm.

2) The party of the First Part shall pay the settlement amount of Rs.13.35 Crores to the party of the Second part to Mr.Sunil D. Gupta (which shall include the amounts due to Mr.Ravi S. Gupta and Rs.1.18 Crs. Shall be payable directly as per Appendix B and C) within the period commencing from 7.5.2018 and ending at 28.2.2019 in 7 installments on the following dates:-

<i>Date</i>	<i>Chq. No.</i>	<i>Payment (Rs.)</i>
30.05.2018	111268	Rs.0.85 Crores
30.05.2018	111269	Rs.0.50 Crores to Smt. Ruta Gupta
14.07.2018	111270	Rs.1.32 Crores
14.07.2018	111271	Rs.0.68 Crores to S P Gupta (HUF)
31.08.2018	111272	Rs.2 Crores
14.10.2018	111273	Rs.2 Crores
30.11.2018	11275	Rs.2 Crores
14.01.2019	112780	Rs.2 Crores
28.02.2019	112767	Rs.2 Crores

The party of the First part shall handover on execution of this Settlement Agreement 7 (seven) duly signed Cheques for the amount referred herein above and the said Cheques shall be submitted on the respective due dates for payment. However, the party of the Second part with specific written request of the party of the First part may extend the date for deposit of the Cheques at the most for 45 more days from the due date but in any event the said payment shall be paid on or before or along with the immediate next installment and the last installment at any circumstances be paid on or before 28th of February, 2019.

3) The parties expressly agree that there shall not be two consecutive defaults/delays at any point of time and in the event of two consecutive defaults in the payment of the installment as agreed hereinbefore or default in payment of last installment by 28.02.2019, this Settlement Agreement deemed to have been breached by the party of the First part and in any such eventuality, the party of the second part shall have the absolute right and liberty to recover the entire

amount of Rs.19.25 Crores, from the party of the First part and the party of the first part shall be liable to pay the said entire amount to the party of the Second part along with interest @ 18 % p.a. on the said balance amount from 07.05.2018 till the full and final payment and/or recovery thereof. It is, however, agreed that the amount already paid under this Agreement shall be given credit against the amount due and recoverable from the party of the First part.

4) In the event of this Settlement Agreement fails, the dues mentioned herein, shall carry interest @ 18% p.a.

5) It is also agreed that in the event of settlement fails, the party of the First part shall be liable to pay the party of the Second party the amount of Rs.19.25 Crores along with interest @ 18% p.a. from the date of this Agreement. It is, however, agreed that the amount already paid under this Agreement shall be given credit against the amount due and recoverable from the party of the First Part.”

28. In the face of aforesaid stipulations, it would be simply impermissible for the Defendants to urge that the Settlement Agreement does not constitute a written contract.

29. I have extracted the terms of the Settlement Agreement on purpose. The aforesaid terms are required to be appreciated in the backdrop of few uncontroverted facts. First, Plaintiff Nos.2 and 3 only, were admitted into the partnership on the terms that they would invest an amount of Rs.10 Crores. In the MOU dated 29 July 2017 the Defendants have acknowledged that Plaintiff Nos.2 and 3 paid a sum of Rs.7

Crores. Initially, the parties had agreed that the profits would be shared by the Plaintiff Nos.2 and 3 and Defendants in the ratio of 32% : 68%. With the reduction in the exposure of the Plaintiffs, the ratio came to be modified to 22.40% : 77.60%. In accordance with the modified ratio, under the MOU dated 29 July 2017, it was agreed that a sum of Rs.13.35 Crores was to be paid to the Plaintiffs by the Defendants within six months of 29 July, 2017. It is imperative to note that the Agreement to share profit was premised on estimated profits. In the event, the profits fell below the estimated profits, the Defendants were to compensate the Plaintiffs on their own accord (para 11 of the MOU dated 19 February 2015 and para 11 of the MOU executed in the month of September, 2016).

30. It would be contextually relevant to note that the Deed of Retirement executed on the very day on which the Settlement Agreement was executed i.e. 7 May 2018, inter alia, provided for the Settlement of the Accounts and cessation of the interest of the retiring partners. Clauses Nos.5 and 6 of the Deed of Retirement read as under :

“5. The parties hereto agree that partnership accounts up to the date of retirement shall be prepared and settled by taking amongst other thing value of all the existing rights, assets and liabilities of the partnership business. The balance amount standing in the name of the retiring partners as capital to be transferred to loan account.

6. The Retiring Partner shall not have any right, title and interest in

the said partnership business and all the assets including goodwill, benefits of all permits and licenses held by the firm.”

31. It seems that instead of settling the accounts as of the date of retirement, a contemporaneous Agreement for Settlement has been executed by and between the parties. However, it does not make a reference to the Deed of Retirement. In the circumstances, what consequences flow from the execution of the Deed of Retirement, in my view, raises a triable issue. The character of the sum of Rs.19.25 Crores which the Defendants acknowledged as due and payable under clause 1 of the Settlement Agreement (extracted above) is thus a matter for adjudication. Profits have yet not been ascertained. Determination of the ratio of profit was, as seen above, on the basis of an estimated profit. Moreover, the quantum of profits, in the event the profit fell below the estimated amount, was a matter to be addressed by the Defendants on their own accord. All these factors, in my considered view, render the entitlement of the Plaintiffs to the amount agreed to be paid by the Defendants a matter for trial.

32. Nonetheless, there is a clear and categorical acknowledgment of a receipt of Rs.7 Crores in the MOU dated 29 July, 2017. Even in the Affidavit in Reply, there is a clear and categorical admission that the Plaintiff Nos.2 and 3 have invested a sum of Rs.6.85 Crores. Though, on the said count, an endeavour was made to contest that Plaintiff Nos.2 and 3 have paid a sum of Rs.7 Crores, in view of the clear and explicit admission of receipt of the amount of Rs.7 Crores and the fact that the short

fall is relatively small, I am impelled to hold that the Defendants do not deserve leave to defend the Suit without making a deposit of the admitted amount of Rs.7 Crores.

33. The upshot of aforesaid consideration is that the decree passed by this Court on 17 March 2021 is required to be set aside and the Defendants are entitled to grant of leave to defend the Suit on the condition of deposit of Rs.7 Crores.

34. Hence, the following order :

ORDER

- (i) The Application stands allowed.
- (ii) The order and decree dated 17 March 2021 allowing the Summons for Judgment stand set aside.
- (iii) The Defendants are granted leave to defend the suit subject to condition of deposit of Rs.7 Crores in this Court within a period of six weeks from today.
- (iv) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendants shall file their written statement within a period of thirty days from the date of deposit.
- (v) If this conditional order of deposit is not complied with, within the above stipulated period, the plaintiffs shall be entitled to apply for an *ex-parte* decree against the defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

(vi) The Summons for Judgment accordingly stands disposed.

(vii) In view of the disposal of this Application, the IA No.1932 of 2022 also stands disposed.

(N.J.JAMADAR, J.)