<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.</u>

<u>WRIT PETITION NO. 263 OF 2022</u>

1. Maimoon Construction & Development Co. a Partnership Firm, duly registered under the Partnership Act, having its Office at Maimoon Chambers, Gandhibagh, Nagpur, through its partners.

2. Iqbal Hussain Maimoon S/o. Late Asgharali Maimoon, Aged About 69 Years, Occupation : Business, R/o. 4th Floor, Oak Regal Apartment, Rajnagar, Nagpur – 440 013.

3. Abdul Hussain Maimoon S/o. Late Asgharali Maimoon, Aged About 66 years, Occupation : Business, Resident of 502, 5th Floor, Springdale, Apartment, Rajnagar, Nagpur-440 013.

.... **<u>PETITIONERS.</u>**

// **VERSUS** //

Smt. Sabiha w/o. Akhtar Parvez Maimoon, aged about 60 years, Occupation : Doctor, R/o. House Number 723, Nelson Square, Chhindwara Road, Nagpur.

.... **<u>RESPONDENT.</u>**

Shri M.G.Bhangde, Sr. Adv. a/b. Shri A.M.Quazi, Advocate for Petitioners.
Shri C.S.Kaptan, Senior Advocate a/b Shri Masood Sharif & Shri Adil Mirza, Advs. for Respondent.

<u>CORAM</u> : <u>ANIL S. KILOR, J.</u>
<u>DATED</u> : <u>AUGUST 02, 2023.</u>

ORAL JUDGMENT :

1. Heard.

2. **RULE**. Rule made returnable forthwith. Heard finally by consent of the learned counsel for the parties.

3. The respondent is a wife of brother of petitioner Nos. 2 and 3, who was a partner of the petitioner No.1-Partnership Firm. The respondent on the basis of outstanding amount shown against her name in a balance sheet of the petitioner No.1-Firm, as unsecured loan provided by the respondent and TDS Certificate along with correspondence between the respondent and petitioner Nos. 2 and 3, filed a summary suit under Order XXXVII of the Code of Civil Procedure (CPC) for recovery of Rs. 1,05,72,293/-.

4. The petitioner, who was the defendant in the said suit, applied for grant of leave to defend the suit, which came to be allowed vide order below Exh.21 dated 17/09/2021 on a condition of payment of 20% of the suit claim. Hence, this petition.

5. Shri Bhangde, learned Senior Advocate for the petitioners makes following submissions :

a) In absence of any written contract or pleading to that effect, the respondent cannot maintain a summary suit. In support of his contentions, he has placed reliance on a Full Bench judgment of this Court in the case of *Jyotsna K.Valia..vs.. T.S.Parekh & Co.*, reported in **2007(4) Mh.L.J. 517.**

b) No pleadings are made giving details about the payment, the dates etc. as secured loan to the petitioner No.1-Firm;

c) The respondent has not shown her source of income;

d) The respondent's claim is wholly based on balance sheet and TDS Certificate. Whereas, the entries in balance sheet are made for fiscal and income tax purposes as it is a family business;

e) Though the petitioners may not have raised a good defence but raised a triable issue indicating that the petitioners have a fair or bonafide or reasonable defence. Hence, the learned trial Court ought not to have granted leave with condition. For this purpose, he has placed reliance on a judgment of the Supreme Court of India in the case of *Sudin Dilip Talaulikar ..vs.. Polycap Wires (P) Ltd.*, reported in **(2019) 7 SCC 577**.

6. In reply Shri Kaptan, learned Senior Advocate for the respondent makes following submissions :

i) When the accounts were submitted by the petitioners to the respondent, the respondent did not raise any demur to it and confirmed the accounts. Hence, the suit is based on settled accounts. For this purpose he has placed reliance on the judgment of Full Bench of this Court in the case of *Jyotsna K.Valia..vs.. T.S.Parekh & Co.*, reported in **2007(4) Mh.L.J. 517** and a judgment of this Court in the case of *R. Kumar & Co. ..vs.. Chemicals Unlimited*, reported in **2001 (1) Mh.L.J. 687**;

ii) The contrary pleadings are taken in the application to grant leave to defend;

iii) The petitioner Nos.2 and 3 as partners of the petitioner No.1 Firm, have admitted the claim of the respondent in their letter dated 13/10/2020;

iv) The case of the petitioners that petitioner No.1-Firm is a family business and the entries taken in the accounts are for fiscal and tax purposes, is contrary to the record and the said contention of the petitioners was rightly rejected by the learned trial Court;

v) Once the petitioner Nos. 2 and 3 have admitted that the respondent has independent income source, now the contrary stand cannot be taken that the respondent has no income source.

vi) The petitioners failed to raise any good defence or any reasonable defence. Therefore, the learned trial Court has rightly imposed the condition by granting leave to defend.

7. In light of rival contentions of the parties, I have perused the record and the impugned order below Exh.21.

8. Before examining the matter on merits, it would be appropriate to reiterate the law in regard the 'written contract' and the 'settled accounts'. The Full Bench of this Court in the case of *Jyotsna* (supra) has held thus :

> "*16. To answer the questions raised certain provisions and expressions need to be considered. Let us first understand the expression 'Contract in Writing' Section 10 of the Indian Contract Act, 1872 as reproduced below sets out, what agreements are contracts:*
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> *"10. What agreements are contracts. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in [India] and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."*
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> *Contract has been defined under Section 2(1) as "an agreement enforceable by law". Agreement has been defined in Section 2(e) as "every promise or every set of promises forming the consideration of each other is an agreement."*
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> *"Written contract" in Black's Law Dictionary (8th Ed.) means as under:*

"written contract" - A contract whose terms has been reduced in writing.

A written contract or a contract in writing need not always be a contract signed by both the parties and may consist of exchange of correspondence of a letter or letters written by one and assented to by the promisor without signature or even of a memorandum or printed document not signed by either party. In T.A. Ruf and Company Ltd. v. Pauwels (1919) 1 K.B. 660, Duke, L.J. observed as under:

"As to the suggestion which was made that the words "contract in writing" import a contract made by means of a writing or writings signed by both parties, I do not think the words necessarily have that meaning. A document purporting to be an agreement may be an agreement in writing sufficient to satisfy the requirements of an Act of Parliament though it is only verified by the signature of one of the parties: In Re Jones (1895)2 Ch. 719. Here the question is one of a bargain for the sale of goods. I doubt whether the objection which is here set up to avoid a business transaction would have been sufficient to support a special demurrer before the passing of the Common Law Procedure Acts."

Relying on these observations, the Madras High Court in Lucky Electrical Stores, by Partner Mahendra Kumar Shah and Anr. v. Ramesh Steel House, by Partner Babulal 1988, Madras Law Reports, 187 in a case where the invoice of the bill was not signed by the other party to the contract, however, as a result of the acceptance of the goods delivered in pursuance of the invoice, on the demand for the price of goods admittedly received by the purchaser on the basis of the invoice, observed that it must be held, to arise on a "written contract".

A written contract therefore need not be evidenced in a single document written by the parties since the written document can be by exchange of documents in writing between the parties. On the other hand an implied contract would arise by the acts of parties to indicate an implied contract. <u>A written contract, contemplated under Order XXXVII need not be necessarily signed by both the parties. However, the writing must be such to arrive at a conclusion that an agreement certainly has been brought into existence and that the claim made under such an agreement ought to</u>

be indisputable. In Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji AIR 1955 SC 812, while construing Section 2(a) of the Arbitration Act, 1940, the Supreme Court observed that it is well settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties and it is sufficient if the terms are reduced to writing and the agreement of the parties is established. In the Arbitration Act of 1966, Section 7 specifically provides that the arbitration agreement shall be in writing.

A learned Single Judge in an unreported judgment in Jaishree Chemicals v. M/s Esskay Dyeing and Printing Works Summons for Judgment No. 23/1976 in Suit No. 1405 of 1975, decided on 19th April, 1976, considering the expression "written contract", under the amended provision, held that it must be given an extended meaning and if it is possible to spell out an agreement enforceable at law to do something to be found in the writing, which binds the parties, it is possible to hold that such an agreement is a contract in writing.

These are some indicators of understanding the expression "a contract in writing".

17. to 24 . ...

25. With that, let us consider what constitutes a "settled account" or "account stated". Before further discussing the issue, it would be relevant to refer to some judgments which, in our opinion, shed light on the issue and can be said to have conclusively decided that aspect of the matter. In Tulsiram Shrikisan Marwadi v. Zaboo Bhima Shankar A.I.R. 1949 Nagpur 229, learned Division Bench was considering as to what would be an account stated.

…

The Privy Council had an occasion to deal with the issue in the case of (Elvira Rodrigues) Siqueira v. (Godnicalo Hypolito Construction) Noronha A.I.R. 1934, Privy Council, 144. The Privy Council was considering Section 25(3) of the Contract Act, 1872 and Article 64 of the Limitation Act, 1908 whether - a suit could be maintained on a settled account. It is in that context, that Lord Atkin, speaking for the Privy Council, held as under:

"Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may

only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described."

This judgment was considered by the Supreme Court, in Gordon Woodroffe & Co. (Madras) Ltd. v. Shaikh M.A. Majid & Co. A.I.R. 1976, Supreme Court, 181. The second question in issue before the Supreme Court was whether there was a settled account between the parties and whether it was open for the plaintiff to reopen it. It was an admitted fact that to the statement of accounts, no objections were raised by the plaintiff any time nor was a single document produced to show that the plaintiff ever wrote to the defendant raising an objection to the statements of account. At one stage, the plaintiff sent a memorandum to the defendant, accepting the accuracy of the accounts. It is in that context that the Court was considering the concept of "account settled" or "stated" We may gainfully refer to a portion of paragraph 14:

"(14) The legal position is that the accounts are settled or stated if they are submitted and accepted as correct by the other side to whom the accounts have been rendered. Such a statement of accounts need not be in writing, nor is it necessary that before the accounts are settled, they should be gone into by the parties and scrutinised and supported by vouchers. It is sufficient if the accounts are accepted and such acceptance may be inferred by conduct of the parties. As observed in Daniell's Chancery Practice, eighth edition, Vol. I, p. 419:

"<u>The mere delivery of an account will not constitute a stated account without some evidence of acquiescence which may afford sufficient legal presumption of a settlement.</u>"

...

<u>Accounts stated which contains entries on both sides and parties who have stated the account between them have agreed that the items on one side should be set off against the items on the other side and the balance amount should be paid, would amount to a written contract for good consideration arising from the fact that the items have been so set off. Such an account stated gives cause to a contract in writing on a fresh cause of action, with an implied promise to pay</u>.

26. & 27 ...

28. The issues which remain to be answered would be (a) on settled accounts which are confirmed by the defendants (b) on acknowledgment of liability, on a mere writing or receipt. We have classified these under two heads as acknowledgment of liabilities or mere writing or a receipt, many a time have to be read together.

Before answering the issue we must note that there must be the following requirements before a summary suit would lie:

(1) There must be a concluded contract;

(2) The contract must be in writing;

(3) The contract must contain an express or implied promise to pay.

There is no dispute in respect of the first two predicates. The only issue is in respect of the third predicate. As we have noted earlier, we are not concerned here with an implied contract, but an implied term in a written contract. The defendants would be right to contend that an implied contract is not a written contract. Is a summary suit maintainable on an implied term in a written contract with an implied term to pay. In our discussion we have noted that the expression "implied" term is used in different senses. In some contract it would not depend on actual intention of the parties, but on a rule of law, such as the terms, warranties or conditions, which if not expressly excluded the law imports, as for instance under the Sale of Goods Act, Marine Insurance Act, Master and Servant and Landlord and Tenant. To imply a term in the contract as implied term in

> *our opinion the test laid down by Kim Lewison in 'Interpretation of Contract' would be relevant. At the same time the Court would have to note that the general presumption is, however, against the implying of terms into a written contract. It is, therefore, again not possible to lay down a general Rule as to when an implied term in a contract can be the subject matter of a summary suit. The issue before us is limited to an implied promise to pay. That would necessarily depend on the facts of each case. The two issues as formulated may now be answered.*
>
> *29. In so far as the 'settled account is concerned,' it is no doubt true as noticed by the learned single Judge, that the various judgments adverted to, for holding that the summary suit would lie on a settled account, either of the Privy Council or of the Supreme Court did not arise from suits filed as summary suits. However, after the judgment of the Privy Council (Elvira L. Rodrigues) Sequeira (supra) which has been considered by the Supreme Court in Hiralal & Ors. (supra), <u>a summary suit on a settled account, duly confirmed by the defendant is maintainable as it is an acknowledgment by the defendant in the ledger in which mutual accounts have been entered and the accounts settled between them. Such settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. A summary suit would therefore lie on 'Settled accounts duly confirmed by the defendants'. Issue (1) is answered accordingly</u>.*
>
> *30. In so far as acknowledgments writing or receipt are concerned, considering the various judgments adverted to earlier on behalf of the plaintiffs and defendants and the discussion, it is not possible to lay down any precise test as to when a Summary Suit would lie on an acknowledgment writing or receipt. That would depend firstly on the document itself, the practice, usage and customs of the trade as also the facts of each case."* (emphasis supplied)

9. In the present matter at hand, there is no dispute about the amount shown in the balance sheet of the petitioner No.1-firm, against the name of the respondent as unsecured loan. There is also no dispute

that the TDS was also paid on the said amount and in a reply dated 13/10/2020, to the notice issued on 04/10/2020 by the respondent, demanding the amount claimed in the suit, the petitioner Nos. 2 and 3 admitted the following facts:

a) Petitioner No.1 -Firm is not a family business.

b) The respondent has her independent source of income;

c) The petitioners have bounden duty to pay the loan amount to the respondent and for that the petitioners assured the respondent;

d) The amount of the respondent is well secured because the firm is having many properties;

10. While dealing with the objection raised by the petitioners to the tenability of the suit as a summary suit, the learned trial Court has observed in paragraph Nos. 16 and 17 thus:

> "*16. The above facts of the present case are similar with the facts in the case of* ***R. Kumar ..vs.. Chemical*** *(supra). In this authority it is held by Hon'ble High Court that the summary suit based on the entries reflected in the books of defendants. The defendants themselves had addressed three letters to the plaintiffs voluntarily pointing out the amount started in their books of account to be their liability towards the plaintiffs. Plea taken by the defendants that summary suit would no lie could not be sustained. Implied obligations, if they create a liability to pay debt or liquidated demand in money can be enforced by instituting summary suit.*

> *17. Thus, in view of ratio in the case of* ***R. Kumar ..vs.. Chemical*** *(supra) the summary suit would lie which is non the basis of the entries reflected in the Balance Sheet, Books of Accounts and TDS certificate. In addition to Balance Sheet, Books of Accounts and TDS certificate, the present case is also based upon reply notice addressed to the plaintiff admitting their liability to pay loan amount to the plaintiff."*

11. In the present matter at hand, undisputedly, nowhere the respondent has pleaded the details about the payment of unsecured loans advanced to the petitioner No.1-Firm. In the plaint the respondent has not given the details in respect of the dates, amount and terms and conditions of such payments. Thus, in absence of any such details, it is the specific case of the petitioners that the said entries were for fiscal and income tax purposes, which has been rejected by the trial Court. However, the fact remains that no details have been provided by the respondent about payment of unsecured loans to the petitioner No.1-Firm.

12. The learned trial Court, relying upon the judgment in the case of *R. Kumar & Co.* (supra), has held that on the basis of balance sheet and TDS Certificate the respondent can maintain the summary suit. However, in the said case of *R. Kumar & Co.* (supra) the plaintiff had given all the details about the date, the sum which was paid and other details, which are missing in the present suit.

13. The petitioners have pointed out the said fact of not giving necessary details in paragraph Nos.8, 9 and 31 of the application Exh.21.

14. Thus, it is apparent on the face of the record that the judgment in the case of *R. Kumar & Co.* is distinguishable on facts. However, the said fact has not been noticed by the learned trial Court.

15. In light of above referred observations, it is evident that there is no findings recorded by the learned trial Court that there is a settled account which amounts to written contract, as held in the case of *Jyotsna* (supra) that mere delivery of an account will not constitute a 'stated account' without some evidence of acquiescence which may afford sufficient legal presumption of settlement. The learned trial Court has also not considered the above referred admissions given by the petitioners in the letter dated 13/10/2020 and its effect to determine whether there is a written contract.

16. Thus, it is clear that the learned trial Court in paras 16 and 17 of the impugned order, without having regard to above referred important aspects, merely on the basis of balance sheet and TDS Certificate, held that summary suit is maintainable. The learned trial

Court further failed to consider that even if Balance Sheet and TDS Certificate is there, is there further requirements as per the law laid down in the case of *Jyotsna* (supra), to arrive at a conclusion that there is a written contract.

17. In the circumstances, I am of the opinion that the matter needs to be remanded back to the learned trial Court to decide the application Exh.21 afresh after taking into consideration the observations made herein above.

18. Accordingly, I pass the following order:

i) The writ petition is partly allowed.

ii) The impugned order dated 17/09/2021 passed below Exh.21 by the 15th Joint Civil Judge Senior Division, Nagpur in Summary Civil Suit No. 894 of 2020 is hereby quashed and set aside.

iii) The matter is remanded back to the trial Court to decide the application Exh.21 afresh, after hearing both the parties.

The Writ Petition is **disposed of** accordingly. No order as to costs.

(ANIL S. KILOR, J)

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