

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5224 OF 2021

1. AMA Industries Pvt. Ltd., a company duly registered under the Companies Act, 1956, having registered office at Maimoon Chambers, Gandhibagh, Nagpur, through its Director Iqbal Hussain Maimoon S/o. Late Asgharali Maimoon, Aged about 69 years, Occupation Business, Resident of 4th Floor, Oak Regal Apartment, Rajnagar, Nagpur – 440 013.
2. Iqbal Hussain Maimoon S/o. Late Asgharali Maimoon, Director AMA Industries Private Limited, 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, Director AMA Industries Private Limited, Aged about 66 years, Occupation : Business, R/o. 502, 5th Floor, Springdale, Apartment, Rajnagar, Nagpur – 440 013.

.... **PETITIONERS.**

// VERSUS //

Akhtar Parvez Maimoon S/o.
Late Asgharali Maimoon, aged
about 64 years, Occupation :
Business, R/o. House Number 723,
Nelson Square, Chhindwara Road,
Nagpur.

.... **RESPONDENT.**

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

CORAM : ANIL S. KILOR, J.
DATED : AUGUST 02, 2023.

ORAL JUDGMENT :

1. Heard.
2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the learned counsel for the parties.
3. The petitioner Nos.1 and 2 and the respondent are the real brothers. The respondent was a Director of the Petitioner No.1-Company. In a summary civil suit filed by the respondent for recovery of amount of Rs.3,80,99,758/-, the petitioners filed an application for grant of leave to defend the suit which came to be allowed subject to 25% payment of the suit claim vide order dated 27th October, 2021. The said order is under challenge in this writ petition to the extent imposition of condition of payment of 25% amount while granting leave to raise defence.

4. It is the case of the respondent that the petitioner No.1 company was in need of money for conducting the business and on request by the petitioner Nos. 2 and 3 the respondent had from time to time provided loan to the petitioner No.1 as per the requirement of the company since past several years. It is the further case of the respondent/plaintiff that the amount advanced/paid by him was in regular course of the business of the company as much as there was no lending of money. It is contended that the defendants/petitioners used to annually provide the respondent the statement of account of the company for enabling the plaintiff to file his income tax returns and accordingly the amounts shown in the accounts of the petitioner No.1 company as unsecured loan from the respondent used to reflect in the income tax returns of the respondent/plaintiff. However, the petitioners have stopped the said practice giving the copy of balance sheet since 2019 though repeatedly demanded by the respondent. The respondent further states that as per records of petitioner No.1 company an amount of Rs.3,07,25,612.00 belonging to the respondent was reflected in the accounts of the company. It is contended that mentioning of the amount as outstanding amount in the books of account is an admission of the liability and amounts to balance confirmation and promise to pay the amount by the defendants to the plaintiff under the written contract. Therefore, the

plaintiff filed a summary suit under Order XXXVII of Code of Civil Procedure (CPC) for recovery of amount of Rs.3,07,25,612.00 along with interest thereon from 01.04.2019 till realization.

5. The petitioners/defendants filed an application for grant of leave to defend the suit. In the said application, a question as regards maintainability of the summary suit was raised along with the defence. It is the case of the petitioners that the entry shown in the accounts in the name of the respondent was shown for fiscal and income tax purposes and thus, the said entries shown have been from the amount as a contribution from the family income and not out of any individual income as such there is absolutely no liability.

6. The said application was allowed subject to payment of 25% of the suit claim. Hence, this petition.

7. I have heard the learned counsel for the respective parties.

8. Shri Bhangde, learned Senior Advocate appearing for the petitioner argues that, to maintain a summary suit under Order XXXVII of CPC the suit must be based on Bills of Exchange, Hundies or

Promissory Notes and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a written contract. It is submitted that in the present matter, admittedly, the suit is not based on Bills of Exchange or Hundies or Promissory Notes, therefore, the learned trial Court ought to have examined the fact that whether there is any written contract. It is submitted that in a case of acknowledgments, writing or receipts as to when a summary suit would lie, that would depend on the document, the practice, usage and custom of the trade as also the fact of each case. He therefore, submits that pleadings to that effect in the suit are necessary.

9. He takes the Court through the pleadings in the suit and argues that there are no pleadings in respect of any written contract, or the necessary facts as regards any practice, usage, custom or the trade. It is therefore, submitted that the summary suit filed by the respondent is not maintainable. To buttress his submission, a reliance has been placed on a Full Bench judgment of this Court in the case of *Jyotsna ..vs.. T.S.Parekh & Co.*, reported in **2007(4) Mh.L.J. 517** and a judgment of the Hon'ble Supreme Court of India in the case of *S.P. Brothers ..vs.. Biren Ramesh Kadakia*, reported in **2008 SCC OnLine Bom. 1599**.

10. Shri Bhangde, learned Senior Advocate would argue that on plain reading of the plaint it can be seen that it does not satisfy the ingredients of Order XXXVII of CPC and therefore, the plaintiff cannot claim any benefit of the Summary Procedure. It is submitted that prior to filing of the suit on removal of plaintiff as a Director of the petitioner No.1 company a notice was issued by the petitioners to the respondent/ plaintiff on 11/08/2020, which was replied by him on 19/08/2020. It is pointed out that in the said reply there is no mention about any written contract. On the contrary, as per the plaintiff there was a commitment by the petitioners to pay him Rs.10,00,00,000/- (Rs. Ten Crores) as decided amongst the petitioners and the respondent.

11. It is further pointed out that, similarly, in a letter issued by the plaintiff on 03/02/2021 to the petitioners, an amount of Rs.3,07,25,612/- was claimed as an outstanding against the company as the said amount reflects in the accounts as well as in the balance sheet of the company. It is therefore, submitted that in the letter issued on 03/02/2021 prior to filing of the suit, there is no mention about any written contract. It is further submitted that any entry in the account, as alleged by the plaintiff, can at the most considered as an

acknowledgment but not in any case a written contract as contemplated under sub-rule (2) of Rule 1 of Order XXXVII of CPC.

12. It is submitted that in the plaint, more particularly in paragraph 1, it is the case of the plaintiff that the petitioner Nos. 2 and 3 and respondent are children of Mr. Asgharali Hasan Ali Maimoon and Mrs. Momina Asgharali Maimoon. The father of the respondent and petitioners viz. Asgharali Maimoon had expired on 17/10/2015 and their mother Mrs. Momina Asgharali Maimoon expired on 20/04/2019, leaving behind *inter alia* the petitioners and respondent as their legal heirs. The petitioner Nos. 2 and 3 along with the respondent were a part of the AMA Group comprising of various companies, partnership firms, etc. The AMA Group was established in or around the year 1860 and today is a conglomeration of various businesses carrying out business in the fields of Aluminum, Fabrication, Petrol Pumps and Manufacturer of Commercial Explosives amongst others. Late Mr. Asgharali Hasan Ali, had inducted his sons into the said AMA Group business during his lifetime in the year 1971. The AMA Group was eventually run by Mr. Asgharali Hasan Ali and his sons from about the year 1971 till his demise. It is therefore, submitted that the aforesaid pleadings show that it was family money and not individual money and therefore, the amount

reflected in audit report is a family money and the entries in the audit report are for the fiscal and income tax purposes which are permissible. In support of his submission, the learned counsel for the petitioners has placed reliance on a judgment of Hon'ble Supreme Court of India in the case of *Vodafone International Holdings BV..vs.. Union of India*, reported in **2012(6) SCC 613**.

13. It is submitted that the plaintiff has not pleaded the details as regards the alleged unsecured loan. He has not mentioned the date and other details which are required in such matters. It is therefore, submitted that the learned trial Court, without looking into the pleadings and the requirement of law to claim the benefit of summary procedure under Order XXXVII of CPC, rejected the objection of the petitioners to the maintainability of the summary suit.

14. The learned Senior Advocate has drawn attention to the various findings recorded by the learned trial Court. It is pointed out that the learned trial Court has observed that, the defence of the petitioner that the company was registered only for fiscal purposes and for taxation and the business was actually run by the Maimoon family is against the public policy, provisions of the Companies Act, 2013, and the

Income Tax Rules. It is submitted that while observing so, the learned trial Court has not discussed any provision of law or any authority in support of such finding. It is submitted that the said finding is contrary to the law laid down by the Hon'ble Supreme Court of India in the case of *Vodafone International* (supra).

15. It is further submitted that liability of the company cannot be fasten upon the Director of a Company unless there is a statutory provision to that effect. For this purpose, he has placed reliance on a judgment of Division Bench of this Court in a case of *Satish D. Sanghavi ..vs.. Union of India and others*, reported in **2009 SCC OnLine Bom. 2112**.

16. Shri Kaptan, learned Senior Advocate for the respondent submits that the Auditor submitted the Audit Report according to the explanation given to the Auditor along with the balance sheet as on 31/03/2020. It is pointed out that at the bottom of the balance sheet the petitioner Nos. 2 and 3 have signed as Directors and one Maheshrao Yerpude signed as Managing Director. It is thus, submitted that as Maheshrao Yerpude, who signed as Managing Director, is not a family member, therefore, it cannot be said that the petitioner No.1-company is a family business.

17. It is pointed out that in the balance sheet under the head 'Outstandings' an amount of Rs.3,07,25,612/- was shown as outstanding against the name of the respondent. Similarly, in the column relating to interest (for the year 2018-19) an amount to the tune of Rs.24,92,228/- has been shown against the name of the respondent. It is submitted that as the petitioner Nos. 2 and 3 have signed the said balance sheet, it depicts that the petitioners have confirmed the accounts and after deducting the TDS the Certificate was issued to the respondent. In the circumstances, it constitutes a 'written contract' as contemplated under sub-rule (2) of Rule 1 of Order XXXVII of CPC.

18. Shri Kaptan, learned Senior Advocate draws attention of this Court to the balance sheet. He has pointed out that at the bottom of the balance sheet it is signed by the Chartered Accountant, the petitioner Nos. 2 and 3, and one Maheshrao Yerpude. He thus submits that as Maheshrao Yerpude is not a family member, the case of the petitioners that it is a family business cannot be accepted.

19. In reply Shri Bhangde, learned Senior Advocate for the petitioners pointed out that Shri Maheshrao Yerpude is salaried Managing Director. The attention to the entry in the balance sheet

showing the payment of salary to Shri Yerpude, was drawn. It is therefore, submitted that the signature made by Shri Maheshrao Yerpude at the bottom of the balance sheet will not change the nature of business as family business.

20. Shri Kaptan, learned Senior Advocate further submits that the petitioners used to supply copy of balance sheet and as the respondent has not raised any demur to it, it amounts to confirmation of the accounts. It is therefore, submitted that on the basis of such confirmation of accounts, the summary suit can be maintained.

21. In light of rival contentions of both the parties, it is evident that the whole controversy revolves around a question whether the suit filed by the respondent for recovery of amount against the petitioners, fulfills the pre-requisites of Order XXXVII Rule 1 of CPC and if the answer is yes, whether the condition of payment of 25% suit claim to raise defence is just and proper?

22. In the circumstances, at this juncture, it would be appropriate to refer to Order XXXVII Rule 1 of CPC [High Court Amendment (Bombay)] which reads thus:

***“Order XXXVII
SUMMARY PROCEDURE***

1. Courts and classes of suits to which the Order is to apply –

“1. (i) This order shall apply to the following Courts, namely :-

(a) High Courts, City Civil Courts and Courts of Small Causes; and

(b) such other Courts as may be specifically empowered in this behalf by the High Court from time to time by a notification in the Official Gazette;

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories or suits as it deems proper and may also from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

(iv) suit for recovery of receivables instituted by any assignee of a receivable.

23. It is the case of the plaintiff that the amount outstanding shown in the books of accounts in the name of the plaintiff, is an admission of liability which amounts to balance confirmation and promise to pay the amount by the defendants to the plaintiff under the written contract.

24. Thus, it is clear from the pleadings in the plaint that this case does not fall in the classes of suits given under sub-rule (2)(a) of Rule 1 of Order XXXVII of CPC, but it falls in the category of cases mentioned in sub-rule 2(b)(i) of Rule 1 of Order XXXVII of CPC i.e. a suit in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a written contract.

25. It is thus, necessary to first understand the expression “Contract in Writing”. In a judgment in the case of *Jyotsna* (supra) Full Bench of this Court had an occasion to deal with the expression “Contract in Writing” and also the expression ‘Settled Account’. The Full Bench of this Court 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:

“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.”

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."

“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. 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 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:

"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."

...

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.

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), 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.

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)

26. As per Section 10 of the Indian Contract Act, 1872 all agreements are contracts if they are made by the :

- (a) free consent of parties,
- (b) parties competent to contract,
- (c) for a lawful consideration and with a lawful object, and
- (d) not expressly declared to be void under the said Act.

27. In the present matter at hand, admittedly, the plaintiff and defendant Nos. 2 and 3 are the real brothers and the whole case is based on certain entries in the accounts of the defendant No.1-Company. According to the plaintiff, said entries are as regards outstanding amount shown against the name of the plaintiff is an admission by the defendants about the liability to pay the amount to the plaintiff and it amounts to a written contract.

28. Indisputably, it is the case of the plaintiff that the defendant No.1-company was in need of money for the conduct of the business from time to time. The plaintiff was requested by the defendant Nos. 2 and 3 for making advance /payment of the amount in the company for its business from time to time. It is further pleaded that the defendants have assured to return the amount advanced/deposited/ paid by the plaintiff with the defendant No.1, together with accrued benefits thereon. The plaintiff had, from time to time, provided loans to the defendant No.1 as per the requirement of the company since past several years.

29. However, the plaintiff has not given any details about the amount advanced or paid by him to the defendant No.1 time to time, the dates when such payment was made, the terms and the details about the entries taken in that regard in the accounts maintained by the plaintiff. Thus, the sole basis of plaintiff's claim is the entries in the account of the defendant No.1.

30. In the above referred backdrop, it is pertinent to note here that the plaintiff was a Director in the defendant No.1 company and he was removed on 23/06/2020 and thereupon, on creating some problems

by the plaintiff for the defendant No.1-Company, the defendant Nos. 2 and 3 issued a letter to the plaintiff on 11/08/2020 requesting him not to do anything which would harm the reputation of the family and the firm.

31. In reply to the said letter, given by the plaintiff on 19/08/2020, he admitted that the defendant No.1 is a family business and there was certain family settlement arrived between the plaintiff and defendant Nos. 2 and 3. Under the said family settlement, the defendant Nos. 2 and 3 are liable to pay Rs.10 Crores to the plaintiff. He further requested the defendant Nos. 2 and 3 to honour the commitment to pay him Rs.10 Crores as decided amongst them. The said letter does not refer to any amount advanced to the petitioner No.1-company as secured loan and any amount recoverable from the petitioner No.1 towards the same.

32. Furthermore, interestingly, in the plaint, there are no pleadings as regards family settlement showing that the defendant Nos. 2 and 3 agreed to pay Rs.10 Crores to the plaintiff.

33. Then, on 03/02/2021 the plaintiff wrote a letter to the defendants for settlement of accounts with respect to defendant No.1

company and repayment of amount outstanding in the name of the plaintiff. In the said letter, first time, the plaintiff came up with a case that he had provided loan to the defendant No.1 on various dates as per the requirement of the company since past several years and the said loan amount is reflected as unsecured loans in the accounts of the company and the aggregate amount of Rs.3,07,25,612/- is outstanding against the company. He, therefore, requested to return him the above referred amount along with interest.

34. Admittedly, in the above referred letter there is no reference about any written contract or there is no mention about the family settlement, whereby the defendant Nos. 2 and 3 agreed to pay Rs.10 Crores to the plaintiff.

35. In the said backdrop, it is necessary to examine the case of the defendants that the entries in the account are for the fiscal and tax purposes since it is a family business.

36. It is pertinent to note that the defendant in his letter dated 19/08/2020 claiming Rs.10 Crores as per family settlement, has admitted the fact that the defendant No.1 company is a family business. The said

fact is also evident from the para 1 of the plaint, which reads thus:

“1. The Plaintiff is a citizen of India and is permanent resident at the address given hereinabove. The Defendant No.1 herein is a company duly incorporated under the Companies Act. The company has its registered address at Maimoon Chambers, Gandhibagh, Nagpur. The Defendant Nos. 2 & 3 are the Directors of the Defendant No.1 company and are presently exercising entire control over the defendant No.1 and its assets. The Plaintiff submits that he along with the Defendant nos. 2 & 3 are children of Mr. Asgharali Hasan Ali Maimoon and Mrs. Momina Asgharali Maimoon. The father of Plaintiff and Defendant Late Asgharali Maimoon had expired on 17.10.2015 and their mother Mrs. Momina Asgharali Maimoon expired on 20.04.2019, leaving behind inter alia the Plaintiff and Defendants as their legal heirs. The Plaintiff along with the Defendant nos. 2 & 3 were a part of the AMA Group comprising of various companies, partnership firms, etc. The AMA Group was established in or around the year 1860 and today is a conglomeration of various businesses carrying out business in the fields of Aluminum, Fabrication, Petrol Pumps and Manufacturer of Commercial Explosives amongst others. Late Mr. Asgharali Hasan Ali, had inducted his sons into the said AMA Group business during his lifetime in the year 1971. The AMA Group was eventually run by Mr. Asgharali Hasan Ali and his sons from about the year 1971 till his demise.”

37. On the other hand, in the application for leave to raise the defence in para Nos. 10 and 19 the defendants pleaded thus:

“10. It will not be out of place to submit that in the plaint, the Plaintiff has admitted that Defendant Number 1, i.e. M/s. AMA Industries Private Limited has been one of the commercial establishment of the family of Mr. Asghar Ali S/o Hasan Ali Maimoon who has had

various businesses. It will not be out of place to submit therefore, that all the companies, firms and business activities though have been registered, under the provisions of Companies Act and Indian Partnership Act, thereby showing the family members as partners therein. However, such arrangement of showing the Partners/ Directors and running the business under the name and style as registered partnership or a private limited company is for specifically fiscal and income tax purposes, whereas all business activities have been family business of Maimoon family.

11 to 18. ...

19. It is thus submitted that the said entries shown have been from the amount as contribution from the family income and not out of any individual income. It is thus submitted that there is absolutely no liability as such of the Defendant No.1 company nor any amount is payable to the Plaintiff which has been shown as alleged unsecured loan.”

38. Thus, it is the case of the defendants that it was a family money and not individual money.

39. After going through the balance sheet, under column “outstanding” the name of the plaintiff with the names of defendant Nos. 2 and 3 appear along with the other names. Against the name of the plaintiff, the amount shown as outstanding is Rs.3,07,25,612/-. Similarly, under the head of “Interest” the names of defendant Nos. 2 and 3 along with the plaintiff with others are mentioned. In the said column against the name of the plaintiff amount shown is Rs.24,92,428/-.

40. As stated above, according to the defendants, the above referred entries are for fiscal purposes and therefore, it is a family money. To substantiate the said fact the defendants pleaded that there is no independent income source of the plaintiff other than the family business. In reply to the said pleadings of the defendants the plaintiff has pleaded as under:

“17. The defendants have alleged that the plaintiff has failed to show his independent source of income other than the business activities of Maimoon Family. In this regard it is submitted that the source of income of the plaintiff is immaterial. What really matters is that the plaintiff had made investment and/ or made payment to the Defendant No.1, which is shown in the books of accounts of the Defendant No.1 and also admitted by the defendants. The Defendants in order avoid their liability towards plaintiff are raising false plea.”

41. The above referred paragraph leaves no element of doubt that, the plaintiff has avoided to disclose his independent source of income, if any. This is significant when it is the case of the plaintiff that he had advanced loan to the defendant No.1-company time to time for several years.

42. The Hon'ble Supreme Court of India, in the case of *Vodafone International Holdings ..vs.. Union of India* (supra) has held thus:

"68. The majority judgment in McDowell held that: (SCC p.254, para 45)

"45. Tax planning may be legitimate provided it is within the framework of law"

In the latter part of para 45, it held that: (SCC pp. 254-55)

"45. ... Colourable devices cannot be [a] part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods".

It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para 46 where the majority holds: (McDowell case, SCC p. 255)

"46. On this aspect one of us, Chinnappa Reddy, J. has proposed a separate ... opinion with which we agree".

The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority.

69. In the judgment of Reddy, J. in McDowell there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability" (paras 7-10, 17 & 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from the Westminster and tax avoidance - these are clearly only in the context of artificial and colourable devices.

334. Revenue cannot tax a subject without a statute to support and in the course we also acknowledge that every tax payer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury. Revenue's stand that the ratio laid down in McDowell is contrary to what has been laid down in

Azadi Bachao Andolan, in our view, is unsustainable and, therefore, calls for no reconsideration by a larger branch.”

43. Thus, it is clear from the above referred observations that it cannot be said that all tax planning is illegal, illegitimate and impermissible. It is further clear that every tax payer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to chose that pattern which will replenish the treasury.

44. In the above referred backdrop, it cannot be said that the documents on which the plaintiff is relying upon constitute an acknowledgment for receipt of money and it contains an implied promise that the money having been received would be repaid by the petitioners. 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.

45. Moreover, the said documents do not suggest that an agreement certainly has been brought into existence between the parties. On the contrary, the facts recorded herein above show that the claim made under the alleged agreement is disputable and not of binding nature of promise.

46. In the present matter, nothing has been pointed out by the respondent that there was any confirmation of settled accounts. The act of confirmation is not unilateral. As regards acknowledgments, writing or receipts, nothing is pleaded about the practice, usage and custom of the trade.

47. Much emphasis was placed on letter dated 24/02/2021 written by the defendant Nos. 2 and 3 as Directors to the plaintiff to say that the defendants have admitted the liability. After going through the said letter, it is evident that at the first place the defendant Nos. 2 and 3 have stated that such claim towards unsecured loan is uncalled for and it is intentional to create complications. In the circumstances, the said letter will not help to consider it as an acknowledgment of liability and to lead to the conclusion that it amounts to a written contract.

48. In light of above referred findings, since nothing is pointed out that there is a written contract, which is the prerequisite to maintain a summary suit under Order XXXVII of CPC, I am of the considered view that in this case the summary suit is not maintainable.

49. It is a settled law that liability of the company cannot be fastened upon the Director of a Company unless there is a statutory provision to that effect. However, whether the petitioner Nos. 2 and 3 are the necessary party to the suit or not, this issue shall be decided by the trial Court. Hence, I keep the said issue open.

50. Hence, for the reasons stated herein above, I proceed to pass the following order:

- i) The writ petition is allowed.
- ii) The impugned order dated 27/10/2021 passed by 15th Joint Civil Judge Senior Division, Nagpur in Summary C.S. No. 186 of 2021 is hereby quashed and set aside and it is further directed that the suit shall be proceeded as an ordinary suit and not as summary suit under the provisions of Order XXXVII of CPC.

Rule is made absolute accordingly. No order as to costs.

(ANIL S. KILOR, J)