



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 570 OF 2024

M/s M. R. Group Through Its Proprietor Junaid Khan
Javeed Khan

VERSUS

Shaikh Hanifa Begum Abdul Haq

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Mr. A. S. Kulkarni h/f Mr. T. R. Quadri, Advocate for
the Petitioner

Mr. S. S. Kulkarni a/w Ms. Namita Thole i/by Ms. R. S.
Kulkarni, Advocate for Respondents

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CORAM : R.M. JOSHI, J

DATE : JULY 26, 2024

PER COURT :

1. By consent of both sides, heard finally at
admission stage.

2. Petitioner who is original Defendant in in
Summary Suit No. 2/2021 being aggrieved by order dated
11.08.2023 rejecting leave to defend has preferred this
Petition.

3. Parties are referred to as Plaintiff and
Defendant for the sake of convenience.

4. Plaintiff filed summary suit for recovery of
amount of Rs. 3,90,000/- against Defendant. This suit
is based upon written agreements between parties which

are in the form of memorandum of understanding dated 15.06.2019 and 20.07.2019. In the said agreement, Defendant had agreed to repay the principal amount along with profits for the agreed period. In spite of Plaintiff approaching Defendant for repayment of the balance outstanding amount as per the written agreement, same was turned down. Legal notice was issued for the recovery of the said amount and as there was no response, suit came to be filed.

5. Defendant appeared in the suit and filed application below Exh. 7 seeking leave to defend. This application was resisted by the Plaintiff. Learned Trial Court allowed the application Exh. 7 vide order dated 22.11.2022 and permitted the Defendant to file leave to defend application within stipulated time. Thereafter on 20.01.2023 Plaintiff filed application vide Exh. 11 praying for passing an order of refusal of leave to defend to the Defendant. Learned Trial Court by passing order dated 20.01.2023 allowed the said application Exh. 11. Defendant filed application vide Exh. 23 for setting aside the said order. By order dated 11.08.2023, the said application came to be

rejected. Being aggrieved by these orders, this Petition is filed.

6. Learned Counsel for Defendant submits that the summary suit under Order XXXVII of CPC is not maintainable in view of the fact that it is not the case of suit based upon the bill of exchange or promissory note or credit note. It is his submission that the claim of the Plaintiff is not certain or liquidated and hence, summary suit is not maintainable. It is also submitted that the suits filed by the other investors are already converted into civil suit. Thus, according to him, in this proceeding also the original Defendant is entitled to unconditional leave to defend.

7. Learned Counsel for the Plaintiff submits that summary suit can be filed on the basis of written agreement/contract. It is his contention that the contract between Plaintiff and Defendant was placed on record before Trial Court. According to him, even if submissions of Defendant are considered that the amount towards profits which is not determined cannot be covered by a summary suit. It is his submission that it is open for the Trial Court to grant conditional leave

to defend in respect of portion of the claim of Plaintiff and for remaining portion, unconditional leave, if any, can be granted. To support this submissions, he placed reliance on the judgment of Full Bench of this Court in case of Sicom Ltd vs. Prashant S. Tanna and Ors, AIR 2004 Bom 186.

8. At the outset, the suit filed by the Plaintiff against Defendant shows that same is based upon the agreements in the form of memorandum of understanding dated 15.06.2019 and 20.07.2019 which are in writing. *Prima facie* perusal of the said agreement shows that a sum of Rs. 3,90,000/- was agreed to be returned to the Plaintiff on expiry of particular period along with interest/profit. Thus, it is clear that though there is no liquidated damages and profit/interest is variable, however, agreement for return of principal amount is certainly maintainable under Order XXXVII and summary suit would lie thereafter. The Full Bench of this Court in case of Sicom Ltd (supra) was posed with a question for determination amongst others i.e., when at the hearing of summons for judgment the Court finds that part of the claim in the summary suit falls ousted the

scope of Order XXXVII and what are the options available to Plaintiff and what powers can the Court exercise. While answering the said question posed before it, the Full Bench has held in paragraph 28(4) as under:

28. xxx

(1) xxx

(2) xxx

(3) xxx

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

(5) xxx

9. Thus, it is now settled position of law that it is open for the Court to grant conditional leave to defend in respect of part of the claim and unconditional leave to defend for the remaining part of

the claim. This position of law squarely applies to the present case as though there is a variable portion of interest/profits, the principal amount of Rs. 3,00,000/- certainly can be considered for the purpose of filing of summary suit. Therefore, in this case, the Trial Court should have granted conditional leave to defend in respect of this amount and unconditional leave in respect of remaining amount.

10. Having regard to the above discussion, the Petition deserves to be allowed partly. The leave is granted to the Defendant to defend the suit in respect of Rs. 3,00,000/- (Rupees Three Lacs Only) on deposit of said amount before the Trial Court. Such deposit be made within a month from today. If such deposit is not made, leave to defend shall stand refused. The defendant however is entitled to defend the suit unconditionally to the extent of the interest/profit part of the agreement in question.

11. Petition, therefore, stands allowed partly in above terms.

(R. M. JOSHI, J.)