



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4959 OF 2023

Shri. Sudhakar Himmat Patil,
Age: 53 years, Occu: Business (Milk Dairy),
Anil Dairy and Dairy Product
R/o: Bhilai, Tal. Parole, Dist. Jalgaon.

....Petitioner
[Orig. Respondent]

VERSUS

Shri. Vasant Lahu Patil,
Age: 64 years, Occu: Business,
R/o: Maruti Dham, Tenament,
Bajwaroad, Chani, Badodara,
Gujrat.

.....Respondent
[Orig. Petitioner]

Appearance :

Mr. B. R. Warma, Advocate for the Petitioner.
Mr. B. R. Kedar, Advocate for the Respondent – Sole.

CORAM : NEERAJ P. DHOTE, J.
RESERVED ON : 11th November, 2025
PRONOUNCED ON : 18th November, 2025

FINAL ORDER :

1. Heard finally at the stage of admission by consent of both the sides.
2. By the present Writ Petition under Article 227 of the Constitution of India, the Petitioner has challenged the order dated 28/02/2023, passed by the learned Civil Judge [Senior Division], Amalner,

District Jalgaon, allowing the Application below Exhibit – 34 for leave to defend, subject to deposit of 10% of the amount claimed as the security, in Summary Civil Suit No.01/2021.

3. The facts, in brief, giving rise to the present Writ Petition, are as follows :

[I] The Petitioner is the Original Defendant and the Respondent is the Original Plaintiff in the above-referred Summary Suit. There was partnership agreement between the parties. The Respondent invested Rs.40,00,000/- in the dairy business of the Petitioner. As the accounts till March 2019 were not completed, the Respondent inquired about the same with the Petitioner. The Petitioner avoided to show the accounts and other details of the partnership business. The Respondent learnt that, the Petitioner was in the process of selling the agricultural land, upon which the partnership business of dairy was going on. The Petitioner stopped the partnership business on his own, without the consent of the Respondent. The Respondent, being entitled to receive the above-referred amount of investment, demanded the same from the Petitioner. As the Petitioner did not return the amount of investment to the Respondent, he filed the above-referred Summary Suit for recovery of Rs.40,00,000/- with interest @ 18% per annum from the date of filing of the Suit till the amount was paid.

[II] The learned Trial Court issued the suit summons. The Petitioner caused appearance in response to the suit summons and filed the Application below Exhibit – 34 seeking leave to defend the Summary Suit. The Respondent objected the said Application. Thereafter, the learned Trial Court passed the impugned order allowing the Application, subject to deposit of 10% of the claimed amount as the security within one [01] month.

4. It is submitted by the learned Advocate for the Petitioner that, as per the provisions of Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 [hereinafter referred to as ‘the CPC’], only if the claim is admitted by the Defendant, the order of deposit can be passed. Here, the Petitioner disputed the entire claim of the Respondent. Therefore, the impugned order, to the extent of direction to deposit 10% of the claimed amount, was unjustified. The Rule 5 of Order XXXVII of the CPC has no application to the case at hand, and therefore, the Petition be allowed and the impugned order to the extent of depositing 10% of the amount be set aside.

5. It is submitted by the learned Advocate for the Respondent that, the partnership document, and the other relevant documents were on record before the learned Trial Court. The learned Trial Court is empowered to direct deposit of the amount as security pursuant to Rule 6 of Order XXXVII of the CPC. The Application for leave to defend was filed when the Summary Suit was posted for Judgment. The Petitioner sold the property

after the order of attachment. The Suit was also delayed by the Petitioner. In fact, the learned Trial Court has shown leniency to the Petitioner by granting leave to defend and rightly directed deposit of 10% of the amount. There is no merit in the Petition and the same be dismissed. In support of his contention, he relied on the Judgment in **Navnath R. Adak Vs. Rakesh Giridharilal Rungta ; 2020 (1) All MR 749.**

6. Heard both the sides. Perused the papers on record.
7. Order XXXVII of the CPC is in respect of summary procedure. Rule 3 of Order XXXVII of the CPC provides the procedure for the appearance of Defendant. The said Rule of Order XXXVII reads as follows :

“3. Procedure for the appearance of defendant. - (1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexes thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise order, all summonses, notices and other judicial processes, required to be served on the defendant, shall deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff’s pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by pre-said letter directed to the address of the plaintiff’s pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B for such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from service of such summons for judgment, by affidavit or otherwise disclosing such

facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security with the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, execute the delay of the defendant in entering an appearance or in applying for leave to defend the suit.”

8. In Navnath R. Adak Vs. Rakesh Giridharilal Rungta (*Supra*), this Court had an occasion to consider the question of exercise of discretion in granting leave to defend a suit as per the above-referred Order XXXVII Rule 3 of the CPC. The relevant Paragraph from the said Judgment is reproduced below :-

“11. As against this, the learned Counsel for the respondent placed a strong reliance upon a judgment of the Supreme Court in the case of **IDBI Trusteeship Services Limited vs. Hubtown Limited (2017) 1 Supreme Court Cases 568**. In the case of IDBI Trusteeship, the Supreme Court adverted to the question of binding efficacy of the propositions laid down in the case of Mechelec (*supra*), after the amendment of Order XXXVII of the Code in the year 1976. The Supreme Court noted that the judgment in the case of Mechelec (*supra*), in turn, adverts to the propositions

expounded in *Kiranmoyee Dassi's case* (supra). The Supreme Court thereafter noticed the change in the provisions of Order XXXVII Rule 3, brought about in the year 1976, and concluded that the principles stated in paragraph 8 of the *Mechelec's case* (supra) would stand superseded in view of the amendment to Order XXXVII Rule 3 and binding decision of four Judges in *Milkhiram's case* (supra). The observations of the Court in paragraph 16, and restated propositions, formulated in paragraph 17, read as under:

"16. It is thus clear that O. 37 has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that *Milkhiram case* is a direct authority on the amended O. 37 provision, as the amended provision in O. 37 Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order 37 to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat - a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

17. Accordingly, the principles stated in paragraph 8 of *Mechelec's case* will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in *Milkhiram's case*, as follows:

17.1 If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

(emphasis supplied)

9. Coming to the case at hand, undisputedly, the Petitioner has not admitted the claim made by the Respondent. As seen from the observations in the impugned order, the Petitioner has challenged the partnership deed / document, which forms the basis of the Summary Suit. The learned Trial Court has observed that, there must be substantial defence and the defence should not be frivolous vexatious. It referred to the observations in **B. L. Kashyap and Sons Ltd. Vs. JMS Steels and Power Corporation and Ors.; 2022 SCC Online SC 59**. Paragraph No.6 of the impugned Judgment reads as under :

“6] There must be substantial defence. The defence should not be frivolous vexatious. B.L. Kashyap & Sons Ltd. v. JMS Steels & Power Corpn., C.A. No. 379 of 2022, Corporation, 2022 SCC On Line SC 59. decided on 18.01.2022 it was held that, "If the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend. Where the defendant raises triable issues indicating a fair or bona fide defence, but not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. Where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security to balance the requirements of expeditious disposal of commercial causes and of not shutting out triable issues. Where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest. In the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.”

10. The learned Trial Court by referring to the Judgment in **Wada Arun Asbestos (P) Ltd. Vs. Gujarat Water Supply & Sewerage Board, in Civil Appeal No.7314/2008 [Arising out of SLP (C) No.10870/2006]**, imposed the condition of depositing 10% of the claimed amount as the security and condition precedent for leave to defend. The said Judgment in **Wada Arun Asbestos (P) Ltd. Vs. Gujarat Water Supply & Sewerage Board (Supra)** was an Appeal, wherein, 50% of the suit claim was directed to be deposited as the security. By referring to the previous Judgments, it was observed that, it was not a fit case where the impugned Judgment of the High Court should be interfered with. However, the Judgments referred therein reiterate the above-referred legal position in respect of leave to defend.

11. The impugned order shows that, the learned Trial Court heard both the sides and perused the paper before it. The impugned order speaks that, *the proposed defence is that, the very documents on which the claim of the Plaintiff is based is illegal and forged one. Thus, apparently the defence is not vexatious one.* It is further observed in Paragraph No.8 of the impugned order that, *perused the proposed written statement. Partnership document on the basis of which suit is brought is challenged by the defendant. The legality of document in question is disputed. The defence is substantial one. Therefore, the leave to defend should be granted.* The observations made by the learned Trial Court in the impugned order clearly demonstrate that, the learned Trial Court was firmly convinced that, substantial defence was raised. The impugned order nowhere shows that, the defence was ‘moonshine’, ruse or sham. When this was the position, the learned Trial Court ought to have granted unconditional leave to defend. From the observations in the impugned order, it is clear that, the case of the Petitioner falls within clause 17.1 quoted from the observations in Navnath R. Adak Vs. Rakesh Giridharilal Rungta (*Supra*). The Judgment referred to Paragraph No.9 of the impugned Judgment, which was relied upon by the learned Trial Court to direct deposit of 10% of the claimed amount as the security, is not the Judgment on the said proposition. The above-referred legal position remains the same. Thus, the impugned order requires interference to the extent of directing deposit as condition precedent for leave to defend. Hence, the following order :

ORDER

- [I] The Writ Petition is allowed.
- [II] The impugned order dated 28/02/2023, passed by the learned Civil Judge [Senior Division], Amalner, District Jalgaon below Exhibit – 34 in Summary Civil Suit No.01/2021, to the extent of imposing condition to deposit of 10% amount under the claim, is quashed and set aside.
- [III] Writ Petition stands disposed off accordingly.

[NEERAJ P. DHOTE, J.]

Sameer/November-2025