



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

973 WRIT PETITION NO. 12803 OF 2022

Prakash S/o Kallappa Patil,
Age: 37 years, Occupation: Service,
Resident of: at present Singapore,
through his constituted Power of Attorney,
Anand Kallappa Patil;
Age: 38 yrs, Occupation: Business,
R/o: Gajanan Colony, AurangabadPetitioner

VERSUS

Abhay Anant Rudrawar,
Age: 41 yrs, Occu: Business,
Jalan Nagar, Station Road, Aurangabad.Respondent

Appearance :

Mr. A. R. Vaidya, Advocate for Petitioner.

Ms. Neha Udawant h/f Mr. S. J. Salunke, Advocate for Respondent.

CORAM : NEERAJ P. DHOTE, J.

RESERVED ON : 27th November, 2025

PRONOUNCED ON : 15th December, 2025

FINAL ORDER :

1. Impugned in this Petition under Article 227 of the Constitution of India is the common order below Exhibits – 11 and 13, dated 28/02/2022 passed by the learned 10th Jt. Civil Judge (Senior Division), Aurangabad, in Summary Civil Suit No.157/2021.

2. The Petitioner is the Original Plaintiff and the Respondent is the Original Defendant in the above-referred Suit, which is for recovery, based on negotiable instrument covered by a Written Agreement. The suit summons came to be served on the Respondent, and he caused appearance and filed an Application below Exhibit – 11 seeking leave to defend. The Petitioner filed an Application below Exhibit – 13 under Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘the CPC’) seeking summons for Judgment. The learned Trial Court, by the impugned order, granted leave to defend and rejected the Application below Exhibit – 13 filed by the Petitioner.

3. It is submitted by the learned Advocate for the Petitioner that, the impugned order was passed without calling Say of the Petitioner on the Application filed by the Respondent. Without there being defence made out in the Application below Exhibit – 11, the same is allowed. The impugned order do not stand the scrutiny of law. Considering the averments made in the Application below Exhibit – 11, no leave to defendant can be granted and certainly not unconditional leave. The impugned order is against the settled legal principles governing the provisions of Order XXXVII of the CPC. In support of his

contentions, he cited the Judgments in ***Gaurav Singhania Vs. Matrix Agri Science Pvt. Ltd. And Ors.; 2011 (6) BCR 803 and Rajesh Laxmichand Udeshi @ Bhatia Vs. Pravin Hiralal Shah; 2012 0 Supreme (Bom) 1279.***

4. It is submitted by the learned Advocate for the Respondent that, in the Application below Exhibit – 11 for leave to defend, the Respondent explained the factual matrix, which show that, he was having the defence. The Written Statement of the Respondent gives the necessary details. The averments made in the Application and the Written Statement show that, the delay was not intentional. The learned Trial Court has passed reasoned order and rightly allowed the Application for leave to defend and no inference is called for, and the Petition be dismissed.

5. Order XXXVII of the CPC is in respect of Summary procedure. In *Gaurav Singhania (Supra)*, which was in respect of the Order XXXVII Rule 3 of the CPC, it is observed as follows :

“ 6. Heard the learned Counsel for the parties. In my view, the impugned order granting unconditional leave cannot be sustained in terms of Order 37, Rule 3(5) of the Civil Procedure Code. It is well settled that Order 37 of the Civil Procedure Code is a self contained code, in so far as the prosecution of the summary suits are concerned. In terms of Order 37, Rule 3(5) of

the Civil Procedure Code, a time limit is prescribed for seeking leave to defend or otherwise the applicant is obliged to file an application for condonation of delay citing the reasons for the delay. In the instant case none of the kind has been done though admittedly the application for leave to defend has been filed almost after 90 days of the summons being served upon the respondents. The said aspect of delay has been totally glossed over by the trial Court on the ground that in such matters a liberal view has to be taken. The reasoning of the trial Court cannot be sustained more so in view of the fact that the issue before the trial Court was grant of unconditional leave in the said summary suit.”

7. In *Rajesh Laxmichand Udeshi @ Bhatia (Supra)*, which was also the matter in respect of Order XXXVII of the CPC, the relevant observations are as follows :

“15. When a summary suit instituted is based on a cheque which is dishonoured, effect of Sections 138 and 139 of Negotiable Instruments Act raising statutory presumption that the cheque was issued in discharge of a liability, is a relevant consideration to be kept in mind. The said Sections cast a burden upon the defendant to rebut the presumption. Summary suits instituted on cheques which are dishonoured will, therefore, stand on a higher footing than summary suits instituted on the basis of other documents. In such cases, the Court will have to take into consideration the statutory presumption which is raised when the cheques are dishonoured. The object behind providing a statutory presumption under the Negotiable Instruments Act has to be kept in mind while judging the credibility of a defence raised by the defendant in summary suit. Thus, the test of more than “shadowy” and less than “probable” as adverted to by the Apex Court cannot apply in cases where the law requires a person to

explain certain state of affairs. The judgments which are relied upon by the Learned Counsel do not consider the effect of the statutory presumptions raised under the Negotiable Instruments Act when a cheque is dishonoured. In our opinion, when a cheque is dishonoured, the Court is enjoined with the duty to scrutinize the defence put up by the defendant with a much higher degree of care and circumspection. Such summary suits cannot be treated as on par with the cases instituted on contracts or invoices etc. where such statutory presumptions do not operate.

16. *The legislative intent behind enactment of Sections 138 and 139 of the Negotiable Instruments Act is to prevent abuse of the banking system. Thus, one who issues a cheque extends a solemn promise to pay. Based on this promise and action, the recipients arrange their affairs and quite often enter into further transactions. Unless extra ordinary circumstances are made out, one who issues cheque is deemed to have undertaken to pay. Negotiable Instruments Act enforces the promise strictly by raising statutory presumption and treating it as an offence. This provision elevates a cheque to a higher status than the other instruments, such as written contract etc. to which no such statutory presumption is attached. What needs to be emphasized is that presumption in respect of a dishonoured cheque places a higher burden on the defendant to elucidate the defence than the burden which is cast on a defendant where the suit is filed on the basis of ordinary instruments. In the cases based on dishonour of cheques, the defendant must satisfy the conscience of the Court and cannot take shelter behind the rules formulated primarily in respect of suits based on ordinary instruments. The Court while exercising the discretion to grant leave or otherwise to the defendant in such cases, cannot be oblivious of the legislative intent to place the promise made through a cheque on a higher pedestal than the promise made through an ordinary instrument.*

This is not to state that moment a Summary Suit is lodged based on a dishonoured cheque, it must be decreed without anything more. What needs to be emphasised is that the fact that there is a statutory presumption attached to the dishonoured cheque will constitute an important ingredient while considering the question whether leave to defend should be granted in cases of dishonoured cheques and the Court must scrutinise the defence strictly. The object of the summary procedure is ultimately to see that the defendant does not needlessly prolong the litigation by creating untenable, frivolous and casual defences so as to deprive the plaintiff of the monies due to him.

17. *The distinction regarding suits based on dishonoured cheques is also indicated by the Apex Court in V. K. Enterprises and Anr. v/s. Shiva Steels, (2010) 9 SCC 256, wherein the Apex Court has held as under:*

“10. Order 37 CPC has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted.

11. *What is required to be examined for grant of leave is whether the defence taken in the application under Order 37 Rule 3 CPC makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence*

would have been plausible had it not been for the fact that the allegations relating to the interpretation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been disputed on behalf of the petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means. (emphasis supplied)”

8. Coming to the case at hand, as seen from the Complaint of the Summary Suit, it is the case of the Petitioner that, due to old acquaintance in the family, he was knowing the Respondent since long. The Respondent was engaged in the business of the land development and initiated venture of developing a real estate. Because of the acquaintance, the Petitioner was lured to invest a handsome amount in the form of earnest amount under the flat booking. The investment and understanding between the Petitioner and Respondent was reduced into writing vide Agreement dated 03/03/2016 in presence of witnesses, who were the family members of the parties. It was an understanding between the Petitioner and the Respondent that, the Respondent would be liable to return the amount invested, if the project was not completed and the Sale Deed was not executed within a period of twenty four (24) months. As the Respondent failed to perform his duties under the Agreement, relating to the development of the

real estate, he became liable to repay the amount with interest as per the understanding in the above-referred Agreement; however, the Respondent did not honoured his word of payment within time. In furtherance of his obligation, the Respondent issued three post-dated cheques in favour of the Petitioner, which on presentation, were dishonoured for the reason “funds insufficient”, vide Memo dated 23/02/2021. Thereafter, the Petitioner issued legal notice to the Respondent to pay the amount covered under the said cheque on 17/03/2021. The Respondent avoided to accept the said notice, and therefore, the Petitioner had no option but to institute the said Summary Suit for recovery of Rs.33,60,000/- with interest @ 12% per annum from the date of Suit till realization of the entire amount.

9. In the Application below Exhibit – 11 filed by the Respondent for leave to defend, it is stated that, the brother of the Petitioner executed the Agreement for sale with the Respondent on 03/03/2016 for sale of one flat for consideration of Rs.35 Lakhs in Vitthal Dham Apartment. The conditions were mentioned in the Agreement. One of the condition was that, if the construction of flat was not completed within the specific period then thereafter the Respondent will give the amount to the Petitioner and if the said amount is not returned within one (01) year period, the

Respondent will pay the amount with interest. After executing the Agreement of sale in March – 2016, the Respondent started the construction of the Apartment and some portion of the Apartment was completed, however, there was lock-down, which resulted in stoppage of construction work. There was no ill-intention or intentional delay from the Respondent to give the possession of the flat. The Vitthal Dham Apartment scheme was owned by Girish Badge and Vaijinath Bank had financed the said project. The Respondent started the work of the Apartment, in which, the Petitioner and his friend, namely, Pravin Gambhare and the Respondent invested the amount in the said Apartment's scheme. The Petitioner invested Rs.20 Lakhs and executed the Agreement to sale with the Respondent for one flat amounting to Rs.35 Lakhs. The Petitioner gave the money with interest @ 2.50%. Thereafter, in the year 2017, there was Demonetisation, due to which, the Bank account of Vaijinath Bank became Non-Performing Asset (NPA) and Bank seized the said property and the Respondent was trying to release the property from the Bank by depositing the amount. As already the Agreement is executed, the Respondent was ready to handover the possession of Flat No. D-6 to the Petitioner after completion. It is stated that, the Respondent was having substantial defence and the Application be allowed.

10. From the above pleadings or the averments made by the parties, it is crystal clear that, there is no dispute in respect of the money transaction between them based on Written Agreement and issuance of the cheques by the Respondent in favour of the Petitioner in discharge of liability. It would not be out of place to refer the relevant Paragraph No.17 from the Judgment of this Court in **Navnath R. Adak Vs. Rakesh Giridharilal Rungta; 2020 (1) All MR 749**, on the same issue, which reads as under:

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)

11. From the settled legal position, as is clear from the above-referred Judgments cited by the learned Advocate for the Petitioner and the above-referred Judgments of this Court, only when the Defendant makes out a substantial defence, he becomes entitled to unconditional leave to defend the Suit. If he raises triable issue indicating that, he has a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend. If the Defendant raises triable issue but there is doubt about the genuineness of the triable issue or the defence appears improbable, the Trial Judge may impose conditions. If no substantial defence is raised or made out and the amount claimed by the Plaintiff is admitted, leave to defend is to be refused.

12. The impugned order show that, the learned Trial Court's conclusion that, the Defendant was having valid defence, is not supported with reasons. The impugned indicate that, it is passed in a mechanical manner. The impugned order do not reflect that, the discretion used by the learned Trial Court is in consonance with the above-referred principles in respect of the Summary Suits. The impugned order indicate that, the same was passed without appreciating the undisputed aspects of the matter emanating from the pleadings of the parties and is in complete variance with the requirement of law. The only course under such circumstance is to set aside the impugned order and remanded back the matter to the learned Trial Court for re-consideration of the Applications and pass appropriate orders strictly, in accordance with law. Hence, the following order:

ORDER

[I] The Writ Petition is partly allowed.

[II] The impugned order dated 28/02/2022, passed below Exhibits below 11 and 13, in Summary Civil Suit No.157/2021, by the 10th Jt. Civil Judge, (Sr. Division), Aurangabad, is hereby quashed and set aside.

- [III] Both the Applications are restored back on the file of the learned Trial Court for re-consideration and decision, in accordance with law.
- [IV] The parties shall appear before the learned Trial Court on **5th January, 2026**.
- [V] Writ Petition stands disposed off accordingly.

[NEERAJ P. DHOTE, J.]

Sameer/November-2025