

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9718 OF 2024

Om Namay Shivay Logistics }
 International Private Limited, }
 through its Managing Director }
 Kaushik Joshi, Age: 57 years, Occu: }
 Business, having office at 714-716, }
 7th floor, Nirmal Corporate Centre, }Petitioner
 near Nirmal Lifestyles, LBS Marg, } (Orig. plaintiff)
 Mulund (W), Mumbai-400 080. }

V/s.

Raycon Infrastructure Private }
 Limited. }
 Der Deutsche Parkz, Subhash Nagar }
 Road, Next to Classis Marble, bear }
 Nagur Railway Station, Bhandup }Respondent
 (W), Mumbai- 400 078. } (Orig. Respondent)

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 Mr. Abhijeet A. Desai with Karan Gajra, Sanchita Sontakke, Vijay Singh, Mohini Rehpade, Daksha P and Digvijay Kachare, for the petitioner.

Mr. Shanay Shah, Shoma Maitra with Ms. Samruddhi Mali i/by Wadia Ghandy and Co. for the respondents.

CORAM : N.J. JAMADAR, J.

DATED : 6TH MAY 2025

JUDGMENT:

1. Rule.
2. Rule made returnable forthwith and, with the consent of the counsel for the parties, heard finally.

3. The petitioner/plaintiff takes exception to an order passed by the Commercial Court, Greater Mumbai dated 2nd December 2023 in Summons for Judgment No. 100039 of 2023 thereby dismissing the said Summons for Judgment, and granting unconditional leave to the respondent / defendant to defend the suit.

4. The background facts leading to this petition can be stated in brief as under:

4.1 For the sake of convenience and clarity the parties are hereinafter referred to in the capacity in which they are arrayed before the Trial Court.

4.2 Both the plaintiff and defendant are the companies incorporated under the provisions of Companies Act, 1956. The defendant is the owner of an office premises / Unit No. 33, admeasuring 7615 sq. ft in the building known as 'Der Deutsche Parkz' situated at Bhandup, Mumbai (the licenced Premises).

4.3 The defendant agreed to grant the licenced premises to the plaintiff on leave and licence basis. Thus, parties entered into a leave and licence agreement dated 27th June 2018.

4.4 The principal terms of the leave and licence agreement were that, the term of licence would be 60 months, with a lock-in period of 36 months. The plaintiff agreed to pay a licence fee of Rs. 5,42,000/- per month for the initial 36 months, and, thereafter, at the rate of Rs. 6,23,300/- for the next 24 months. The plaintiff has also agreed to pay security deposit of Rs. 48,78,000/- for the lock-in period of 36 months and, thereafter, enhance the security deposit to Rs. 56,09,700/-. Accordingly, the plaintiff paid the initial security deposit of Rs. 48,78,000/-. The plaintiff was put in possession of the licenced premises.

4.5 In the wake of Covid-19 Pandemic the defendant agreed to reduce the licence fee to Rs. 1,00,000/- excluding taxes, for the 3 months i.e. July 2021 to September 2021.

4.6. On 1st September 2021, the plaintiff conveyed to the defendant that it would vacate the licenced premises by 30th September 2021. The defendant, the plaintiff claims, however, suggested that the plaintiff could occupy the licenced premises for a further term of 3 months i.e. till

December 2021 at the reduced licence fee of Rs. 1,00,000/-. Though a draft MoU was shared recording the aforesaid modified terms, it could not be executed. In response to an e-mail dated 17th November 2021, the defendant declined to extend the period of concessional licence fee and indicated that if the plaintiff intended to vacate the licenced premises, the plaintiff may do so on or before 1st January 2022.

4.7 It is the claim of the plaintiff that the plaintiff offered to vacate the licenced premises on 1st January 2022 and called upon the defendant to refund the security deposit. There was an exchange of correspondence between the parties regarding the condition of the premises and the liability of the plaintiff to hand over the premises in the same condition in which it was delivered to the plaintiff, cost of repairs and recovery of the licence fee, at the agreed rate.

5. Eventually, the defendant did not refund the security deposit. Hence, the plaintiff was constrained to institute the suit for recovery of the unpaid security deposit along with interest thereon @

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6. The defendant appeared. The plaintiff took out the Summons for Judgment. The defendant sought an unconditional leave to defend the suit contending, inter alia, that the plaintiff had committed breach of the terms of the leave and licence agreement. The plaintiff had not given the mandatory pre-termination 3 months notice in accordance with clause 11.5 of the agreement nor paid 3 months licence fee. Thus, the plaintiff was liable to pay 3 months licence fee. The plaintiff had also not furnished the accounts statement to show that it had suffered loss, and, therefore, for the period October 2021 to December 2021, the plaintiff was liable to pay the licence fee at the agreed rate. The plaintiff had also caused damage to the licenced premises and defendant was required to incur expenses towards the repairs. Contending that there were substantial and triable issues, the defendant sought an unconditional leave to defend the suit.

7. By the impugned order, the learned Judge, Commercial Court, was persuaded to grant an unconditional leave to defend the suit opining, inter alia, that the plaintiff had not terminated the leave and licence agreement in conformity with clause 11.5 of the agreement, which required the licensee to either give 3 months notice

or pay 3 months licence fee. E-mail dated 24th December 2021 whereby the plaintiff offered to vacate the licenced premises was not in conformity with the said clause. As triable issues as regards the interpretation of the terms of the leave and licence agreement and the rights and liabilities of the parties thereto arose for determination, the defendant deserved an unconditional leave to defend the suit.

8. Being aggrieved, the plaintiff has invoked the writ jurisdiction.

9. Mr. Abhijeet Desai, learned counsel for the petitioner, would urge that, the learned Judge, City Civil Court, committed an error in granting unconditional leave to defend the suit without appreciating the correspondence that had been exchanged between the parties. Though the learned Judge, City Civil Court referred to the communication dated 24th December 2021, to hold that the said communication was not in conformity with the clause 11.5 of the agreement, yet, a prior communication dated 16th November 2021, whereby the defendant indicated that the plaintiff, if he wished to, could vacate the licenced premises on or before 1st January 2022, was ignored. Thus, the stipulation in clause 11.5 of the leave and licence agreement was expressly waived by the defendant.

10. Moreover, the defendant had acknowledged the liability to pay part of the security deposit after deducting the amount which defendant claimed the plaintiff owed to the defendant. In the communication in reply to the communication dated 17th March 2022, the defendant had stated that the defendant had kept ready a cheque towards the refund of security deposit of Rs. 18,08,604/- after deduction of Rs. 30,69,396/- therefrom. Likewise, in the communication dated 27th April 2022, though addressed without prejudice, the defendant had claimed that net of the deduction security deposit repayment would be of Rs. 37,22,151/- In the face of such clear acknowledgment of the liability to refund a part of the security deposit, the learned Judge could not have granted an unconditional leave to defend the suit, urged Mr. Desai.

11. To this end, Mr. Desai placed a strong reliance on the judgment of learned Single Judge of this Court in the case of '***Play Games 24x7 Pvt.Ltd Vs. Loran Leasing and Infotech Pvt. Ltd.***¹.

12. As against this, Mr Shah, learned counsel for the respondent / defendant, supported the impugned order. It was submitted that the plaintiff had not approached the Court with clean hands. The defendant had permitted the plaintiff to occupy the

1 IA No. 655 of 2023 in Commercial Summary Suit No 75 of 2021

licenced premises at the concessional rate of Rs. 1,00,000/- per month during July to September 2021, in the backdrop of the representations that on account of Covid – 19 Pandemic the plaintiff had suffered huge losses. However, for the next trimester i.e. October to December 2021, it was incumbent upon the plaintiff to show that he had suffered the losses. Therefore, in the absence of any contract to the contrary, the plaintiff was liable to pay the licence fee at the agreed rate.

13. Mr. Shah would further urge that, at any rate, the exchange of correspondence relied upon by the plaintiff would amount to novation of contract. The plaintiff would be required to prove at the trial that the terms of the leave and licence agreement were novated. Therefore, the learned Judge, City Civil Court, was justified in granting an unconditional leave to defend.

14. Mr. Shah would urge that the plaintiff cannot be permitted to draw any mileage on account of the fact that the defendant had addressed without prejudice communication. The said communication cannot be construed as the acknowledgment of the liability. Therefore, the learned Judge, City Civil Court, correctly exercised the discretion to grant unconditional leave to defend the suit. No inference is warranted in exercise of supervisory jurisdiction, urged Mr. Shah. To buttress this

submission, Mr. Shah placed reliance on the decision of the Supreme Court in the case of '*Raj Duggal Vs. Ramesh Kumar Bansal*²'

15. The legal position as regards the grant of leave to defend a summary suit is well crystallised. If the defendant raises a substantial defence, leave to defend is required to be granted unconditionally. Where the defendant raises a triable issue in the sense that the defence is fair and reasonable, ordinarily, the defendant is entitled to unconditional leave to defend the suit. However, where the defendant raises a triable issue, but, the Court entertains doubt about the bonafie of the said defence or such defence though plausible, yet, appears to be improbable to the Court, conditional leave to defend the suit can be granted. The conditions may relate to time or mode of trial or an order for deposit of the amount or security for the claim amount. It is only in those cases where Courts finds that defence raised by the defendant is sham and bogus, the Court can decline to grant leave to defend the suit.

16. In the case of **Raj Duggal** (supra), on which reliance was placed by Mr. Shah, the law was succinctly enunciated as under:

“3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant

2 1991 Supp (1) SCC 191

to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

17. In the case of '*IDBI Trusteeship Services Limited Vs. Hubtown Limited*³', the Supreme Court culled out the propositions which govern the exercise of discretion as under:-

17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.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.

3 (2017) 1 SCC 568

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."

18. The aforesaid tests formulated by Supreme Court were reiterated by the Supreme Court in the case of '*B.L. Kashyap and Sons Limited vs. JMS Steels and Power Corporation and Another*⁴' as under:

33.1 As noticed, 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. In the second eventuality, where the defendant raises triable issues indicating a fair or bonafide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, 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 is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, 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.

33.2 Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of

4 (2022) 3 SCC 294

defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, 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.

33.3 Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious”.

19. On the aforesaid touchstone reverting to the facts of the case, it is imperative to note that there is not much controversy over

the essential term of the leave and licence agreement, namely, the initial term and lock-in period, a licence fee for the initial term of the lock-in period, the deposit of the security amount of Rs. 48,78,000/- by the plaintiff with the defendant, or for that matter, the parties are not at issue over the fact that the leave and licence agreement came to be terminated effectively from 1st January 2022.

20. The controversy between the parties revolves around the question as to whether the leave and licence agreement was terminated in conformity with the provisions of the said agreement, and the liability of the plaintiff to pay the licence fee at the agreed rate

21. Clause 11 of the leave and licence agreement under the caption 'termination' bears upon the determination of the controversy at hand. Clause 11.5, 11.08 and 11.10 are material and, hence, extracted below:

“11.5 In addition to any other termination rights set forth in this Agreement, the licensee shall have an option to terminate this Agreement effective at any time, including during the licensee Lock in Period, by paying the licence Fee for the balance period of the licensee's Lock-in Period (if the termination is before the licensee's Lock-in Period) or by paying the licence Fee for 3 (three) months, in the termination by the licensee is after the licensee's Lock-in Period. In such event, the licensee shall have no further obligations, under this Agreement as of the effective date of such termination.

11.6

11.7

11.8 a) The licensee shall be entitled to terminate this Agreement after the licensee's Lock-in Period by giving 3 (three) months advance notice to the Licensor. Upon the termination by the licensee licensee under this clause, the licence granted hereunder shall come to an end after the expiry of the notice period of 3 (three) months as aforesaid.

b) The Licensor shall be entitled to terminate this Agreement after the Licensor's Lock-in Period by giving 3 (three) months advance notice to the licensee. Upon the termination shall --- to an end after the expiry of the notice period of 3 (three) months as aforesaid.

11.9

11.10 Notwithstanding anything to the contrary contained in this Agreement, if the licensee commits a non-monetary breach of this Agreement, the Licensor shall give the licensee notice in writing to remedy the breach complained of within thirty (30) days or, if the breach is of a nature that it cannot be remedied within thrifty (30) days, to begin within such period to take reasonable steps to remedy the breach, and on the failure of the licensee to remedy the breach or commence to remedy the breach within such period, the Licensor at its option shall remedy the breach complained of and shall be entitled to recover the actual costs therefore from the licensee including from the Security Deposit. However, it is hereby clarified that in the event that there is no written intimation specifying the breach then in that event it shall be construed that there has been no breach committed under this agreement".

22. Evidently, the parties had agreed that after the expiry of the lock-in period, the licensee had an option to terminate the leave and licence agreement either by paying licence fee for 3 months or by giving 3 months advance notice to the licensor. The plaintiff terminated the licence beyond the lock-in period. It also appears to be incontrovertible that plaintiff offered to vacate the licenced premises on 31st December 2021 by a communication dated 24th December 2021. The said e-mail dated 24th December 2021, according to the defendant, was in breach of the aforesaid term.

23. The aforesaid factor principally weighed with the learned Judge, City Civil Court. This Court is of the view that, the aforesaid communication ought to have been read in conjunction with the communication which preceded the said communication dated 24th December 2024.

24. From the perusal of the said communications, in a sequential manner, the following position emerges: in the wake of Covid-19 pandemic, the parties executed an MoU to reduce the licence fee to Rs.1,00,000/- per month, excluding the taxes, instead of the agreed licence fee, for a period of 3 months i.e. July, August and September 2021. It was the claim of the plaintiff that the said

dispensation was extended for a further term of 3 months i.e. October to December, 2021. In that context, vide an e-mail dated 16th November 2021, with reference to the meeting the parties had, it was conveyed on behalf of the plaintiff that the plaintiff was ready to vacate the premises by 30th September 2021 but was persuaded to occupy the licenced premises for a further term of 3 months i.e. October to December 2021, at the concessional licence fee of Rs. 1,00,000/- p.m. excluding the taxes. A draft of the MoU was shared. However, there was no response from the defendant.

25. In response to the aforesaid communication, on 27th November 2021, the defendant conveyed to the plaintiff that no further concession would be granted and that the plaintiff would be liable to pay the licence fee and the increased car parking charges as stipulated under the licence agreement dated 27th June 2018, with effect from 1st January 2022 and the sum of Rs. 7,31,700/- towards the enhanced security deposit. What follows is of significance. The defendant contended that if the plaintiff wished to vacate the premises, the plaintiff might do so on or before 1st January 2022.

26. Undoubtedly, whether the aforesaid correspondence would amount to novation of the contract between the parties or dispensing

with the condition of 3 months notice or payment of 3 months licence fee, before the termination of the contract, would be matters for adjudication at the trial. However, there are two further communications, which the defendant had addressed to the plaintiff indicating the nature and quantum of its claim and entitlement to deduct the said amount from the security deposit.

27. First, the communication (Exhibit-O) records that the defendant had computed the deductions at Rs. 30,69,396/- and informed the plaintiff that a cheque of Rs. 18,08,604/- was ready. In the said communication, the defendant had furnished the details of the deduction i.e. Rs. 19,13,547/- towards arrears of licence fee for the period October 2021 to December 2021, Rs.7,55,849/- towards the notice period and Rs.4,00,000/- towards repairs. The aforesaid communication, if properly construed, constitutes the entirety of the claim of the defendant towards the permissible deductions from the security deposit under the leave and licence agreement.

28. It is true that the second communication dated 27th April 2022, whereby the defendant had acknowledged that the net of deductions security deposit repayment would be Rs. 37,22,151/-, was addressed without prejudice. Even if, this communication dated 27th

April 2022 is eschewed from consideration, yet, the fact remains that, under the terms of the agreement the defendant was liable to refund the security deposit and could lay claim to deduct the amount therefrom under the specified heads only. Even if the stipulations in clause 11.10 of leave and licence agreement, extracted above, are construed rather generously, and it is considered that the defendant could deduct the amount towards agreed licence fee, even for the months of October to December 2021, yet, of the own showing by the defendant a sum of Rs. 18,08,604/- was due and payable to the plaintiff.

29. Thus, I find substance in the submission of Mr. Desai that learned Judge, City Civil Court ought to have taken into account the entire correspondence exchanged between the parties. If so considered, the acknowledgment of liability to refund a part of the security deposit becomes abundantly clear. In view of pronouncement of the Supreme Court in the case of *IDBI Trusteeship Services Limited* (supra), where the defendant acknowledges a part of the liability, even if the triable issue has been raised, leave cannot be granted without deposit of the said amount.

30. It is trite law that, at the hearing of the Summons for

Judgment, it is open for the Court to grant conditional leave to defend in respect of the part of a claim and an unconditional leave to defend for the balance.

31. A useful reference in this context can be made to a Full Bench judgment of this Court in the case of '*Sicom Ltd. vs Prashant S. Tanna And Ors*⁵', wherein following proposition of law was enunciated :

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.

32. In the instant case such a severance of claim can be legitimately made as the defendant has acknowledged the liability in respect of a part of the claim.

33. In the totality of the circumstances, I am inclined to follow the aforesaid pronouncement and grant conditional leave to defend the suit in respect of that part of the claim, which has been clearly acknowledged by the defendant. To this extent, the impugned order

⁵ AIR 2004 BOMBAY 186 dated 4/03/2004

deserves to be interfered with. Hence, the following order:

ORDER

- i) The petition stands partly allowed.
- ii) The impugned order stands modified as under:
 - a) Leave to defend is granted to the defendant upon deposit of a sum of Rs. 18,08,604/- before the Commercial Court within a period of six weeks from today.
 - b) The defendant shall be at liberty to file written statement within thirty days of the deposit of the aforesaid amount.
- iii) Rule made absolute to the aforesaid extent.

No costs.

(N.J. JAMADAR, J)