

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.16611 OF 2024

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Radhika Kamal Mirani
@ Rashmi Vijay Rijhwani
vs.

...Petitioner

Nisha Purshotam Mirani

...Respondent

Mrs. Sushma Singh a/w. Ms. Sayali Sawant, for the Petitioner.
Mr. Jagdish Choudhary i/b. M/s.Raj Legal, for the Respondent.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 27, 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith and with the consent of the counsel for the parties, heard finally.
2. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of an order passed by the learned Judge, City Civil Court in Summons For Judgment No. 130 of 2023 in Summary Suit No. 125 of 2023 whereby leave to defend the suit was granted to the defendant subject to the condition of deposit of 25% of the principal amount of the suit claim.
3. Shorn of unnecessary details, the background facts leading to this petition can be stated as under.
4. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.

5. The plaintiff is the mother-in-law of the defendant. The plaintiff has instituted the suit for recovery of a sum of Rs. 13,23,000/- which she has allegedly lent to the defendant so as to facilitate her to subscribe to the share capital of Kamya Forex and Gold India Private Limited (the company) floated by her son Kamal Miran, the husband of the defendant. Interestingly, the mother in law has instituted the suit through her son who is stated to be her constituted attorney.

6. Beneath the apparent financial dispute, there is an underlying and deep rooted matrimonial and familial dispute between the parties. On account of the marital discord, the defendant is estranged from her husband Kamal. Multiple proceedings are pending between the defendant, on the one part, and her husband and the plaintiff, on the other part, including a proceeding under the Protection of Women From Domestic Violence Act, 2005, which is subjudice before the Court of Magistrate, Andheri.

7. Unsurprisingly, the plaint refers to the marital discord and the strained relations between the plaintiff and the defendant and the circumstances in which on account of the allegedly quarrelsome and adamant attitude of the defendant, the plaintiff had to lend the amount of Rs. 13,23,000/- to the defendant, purportedly to buy peace.

8. It is the claim of the plaintiff that in the month of June, 2018 Kamal Mirani was in the process of starting the company, the defendant tried to put hindrances therein and, eventually, agreed to allow Kamal to start the new venture only upon extracting a bargain to appoint her as a Director on the Board of Directors of the said company. Since the defendant had no money to purchase the share of the said company, the plaintiff had lent a sum of Rs. 13,23,000/- to the defendant on the condition that the said amount would be repaid without any interest. The amount was transferred through banking channels and from the account of the defendant the said amount came to be credited to the account of the said company.

9. Marital discord between the defendant and Kamal escalated resulting in multiple proceedings and, on 18th March, 2020 the defendant addressed an email seeking to resign from the Board of Directors of the said company and demanded the refund of the sum of Rs. 13,23,000/- towards her share capital by a demand draft.

10. Asserting that there was a liquidated sum of money due and payable by the defendant to the plaintiff evidenced by statement of bank accounts and that the aforesaid email dated 18th March, 2020 constituted a clear acknowledgment of the debt, the plaintiff instituted a summary suit for recovery of the said amount. Initially,

the suit was converted into a commercial suit. The defendant filed written statement on 16th September, 2021.

11. The plaintiff took out Notice of Motion No. 2717 of 2001 for a decree on admission. By an order dated 24th August, 2022 the said Notice of Motion was dismissed.

12. The learned Judge, Commercial Court, on a Notice of Motion taken out by the defendant, being Notice of Motion No. 3549 of 2022 for the rejection of the plaint, passed an order that the suit be assigned to a regular Court as the dispute was not a commercial dispute within the meaning of section 2(1)(c) of the Commercial Courts Act, 2015. Thereupon, the plaintiff filed the Summons for Judgment.

13. By the impugned order, the learned Judge was persuaded to grant conditional leave to defend the suit observing, inter alia, that in the backdrop of the familial dispute between the parties and the contentions of the defendant that Kamal, her husband, was exclusively managing the affairs of the said company as well as the operation of the accounts of the defendant, triable issue was raised by the defendant. However, since the defendant admitted the liability by addressing aforesaid email dated 18th March, 2020, leave to defend was required to be granted subject to deposit of 25% of the principal amount.

14. Being aggrieved, the defendant has invoked the writ jurisdiction.

15. Mrs. Sushma Singh, the learned counsel for the petitioner, submitted that the instant suit is a link in the chain of the actions and proceedings initiated by the husband of the defendant to harass her. The learned Judge, despite noting that there were matrimonial and familial disputes between the parties and that Kamal, the husband of the deceased, was controlling the personal as well as the corporate affairs of the defendant and there was a triable issue, went on to unjustifiably impose a condition of deposit of 25% of the amount. Once the learned Judge recorded a finding that the defendant has raised a triable issue, unconditional leave ought to have been granted, urged Mrs. Singh.

16. Mrs. Singh further submitted that the summary suit itself was not tenable. The basis of the suit is an honoured cheque under which the amount was transferred to the joint account of the defendant and Kamal. A summary suit is not maintainable on a honoured cheque as it can not be said to be a suit based on negotiable instrument. To lend support to this submission, Mrs. Singh placed a strong reliance on a Full Bench Judgment of this Court in the case of **Jyotsna K. Valia vs. T.S. Parekh and Co.**¹

17. It was further submitted that the learned Judge was in error

¹ 2007 (4) Mh.L.J. 517.

in holding that the defendant had acknowledged the liability. The said communication, was addressed in the context of the stand of Kamal in the proceeding under the Protection of Women From Domestic Violence Act, 2005 that, he had suffered complete loss in the said company. Therefore, the defendant was constrained to resign from the Board of Directors of the said company and seek refund of capital. Inviting attention of the Court to the affidavit in rejoinder filed in this petition, Mrs. Singh attempted to explain away the said demand by asserting that the defendant was to, in turn, return the amount to the plaintiff.

18. Per contra, laying emphasis on the said email dated 18th March, 2020 and the aforesaid assertion in the rejoinder, Mr. Jagdish Choudhary, the learned counsel for the respondent, forcefully submitted that the aforesaid documents contain a clear and categorical admission of the liability. In fact, by way of rejoinder, the defendant had tried to dilute the admission by claiming that the amount was to be repaid to the plaintiff. That, in itself, according to Mr. Choudhary, constitutes an acknowledgment of the debt.

19. Refuting the contentions on behalf of the petitioner that the suit in the present form is not maintainable as a summary suit as it is based on an honoured cheque, Mr. Choudhary urged with tenacity

that the suit is for recovery of a debt or liquidated amount. Such a suit is maintainable sans a written contract, was the thrust of the submission of Mr. Choudhary. To buttress this submission Mr. Choudhary placed a strong reliance on a Division Bench judgment of this Court in the case of **Gokuldas Poddar vs. Ramrikhdas Parasrampuriah and Co.**².

20. In the said case it was enunciated that in the context of Rule 2 of Order 37, as it then stood, the rule itself assumed that the contract, on which the plaintiff is suing, need not be a contract in writing. It may even be an implied contract. But so long as there is a debt or liquidated demand which becomes payable under such a contract, the plaintiff is entitled to sue for the amount due under the contract.

21. Mr. Choudhary submitted that the Full Bench Judgment in the case of **Jyotsna Valia** (supra) does not govern the facts of the case. The decision in the case of **Purnima Jaitly vs. Ravi Bansi Jaisingh**³ rendered by a learned single Judge can be said to be per incuriam the Division Bench Judgment in the case of **Gokuldas Poddar** (supra).

22. Mr. Choudhary, would further urge that the email dated 18th March, 2020 constitutes a clear acknowledgment. The demand for

2 1954 (ILR) Bombay Series 507.

3 2004(1) Mh.L.J. 114.

the refund of the amount of the paid up share capital, implies that the defendant had borrowed the amount from the plaintiff to finance the acquisition of the shares. To this end, Mr. Choudhary placed reliance of the judgment in the case of **State of Kerala vs. T.M. Chacko**⁴.

23. In the said case, in the context of the provisions contained in section 18 of the Limitation Act, the Supreme Court enunciated that to treat a writing signed by the party as an acknowledgment, the person acknowledging must be conscious of his liability and the commitment should be made towards that liability. It need not be specific but if necessary facts which constitute the liability are admitted, an acknowledgment may be inferred from such an admission.

24. Lastly, Mr. Choudhary submitted that, having regard to the fact that only 25% of the principal amount has been ordered to be deposited, the impugned order, even otherwise, does not warrant interference in exercise of the writ jurisdiction.

25. The aforesaid submissions now fall for consideration.

26. Evidently, the defendant and her husband Kamal and the plaintiff have turned astray on account of the matrimonial dispute. In the trail of marital discord a number of proceedings have been filed. From a meaningful reading of the plaint, the substance of

4 (2000) 9 Supreme Court Cases 722.

which has been narrated above, in a little detail, it becomes explicitly clear that the genesis of the instant dispute is also in the marital discord, nay, in paragraph 4.10 of the plaint, the plaintiff refers to the proceedings under the Protection of Women From Domestic Violence Act, 2005 before the the Magistrate wherein her son Kamal had purportedly placed on record the losses suffered in the company, and, thereupon, the defendant tendered resignation and demanded refund of the capital vide an email dated 18th March, 2020.

27. The prayer for grant of an unconditional leave was thus required to be appreciated keeping in view the aforesaid genesis of the dispute.

28. Before advertng to deal with the submission as regards the tenability of the suit in the present form as a summary suit, it may be expedient to note few uncontroverted facts. It emerges from the material on record that a sum of Rs. 13,23,000/- was transferred from the account of plaintiff maintained with Kotak Mahindra Bank, vide cheque No. 654, to an account No. 2111494617 maintained with Kotak Mahindra in the names of defendant and Kamal Mirani, on 20th June, 2018. On the very day, the said amount was transferred to the account of the company. Indisputably, the defendant and Kamal were then cohabiting together.

29. The contentions of the defendant that at that point of time Kamal was managing her affairs and even operated the said joint account is required to be appreciated in the aforesaid backdrop.

30. The moot question that wrenches to the fore is, whether the aforesaid transfer of the amount from the account of the plaintiff to the joint account of the defendant and Kamal, evidenced by the extracts of the bank accounts, constitute the debt or liquidated demand in money covered by Rule 1(2) of Order 37 of the Code. Sub rule (2) of Rule 1 of Order 37 reads as under:-

“(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.”

31. In the facts of the case, clause (a) does not apply as the plaintiff does not seek to recover the amount covered by the instruments, enumerated therein. The plaintiff professedly claimed to recover the debt or liquidated demand in money. Undisputedly, there is no written contract. The endeavour of Mr.Choudhary was to persuade the Court to hold that since the suit is based on debt or

liquidated demand in money, absence of written contract, did not matter. In contrast, it was the submission of Mrs. Singh that the suit rests on honoured cheque and, therefore, it is beyond the purview of sub rule (2) of Rule 1, Order 37 of the Code.

32. The Full Bench Judgment of this Court in the case of **Jyotsna Valia** (supra) squarely addresses the controversy sought to be raised in the instant case. In the said case, the Full Bench considered the tenability of the suit based on various types of documents, including an honoured cheque. The Full Bench held that, a summary suit would not lie on “honoured cheque”. The observations in paragraph Nos. 26 and 27 are material and hence extracted below:-

26] Reference may now be made to a judgment on honoured cheque, in the case of Purnima Jaitly v. Ravi Bansi Jaisingh 2004(1) Mh.L.J. 114. In that case, it was contended that a suit for recovery of loan which was advanced by a Plaintiff by a cheque, would be a suit based on a bill of exchange. Negating the said contention, the Court held that;

"It is true that a cheque is a bill of exchange, a special type of bill of exchange which is drawn on a bank. However, a suit upon a cheque (bill of exchange) means a suit to recover money due on a cheque (bill of exchange) drawn by the defendant, which is dishonoured."

In such a case, the suit must be for recovery of money on a cheque drawn in favour of or endorsed to the plaintiff. A suit, however for recovery of a loan which was advanced by the plaintiff by a cheque is not a suit upon a cheque or a bill of exchange and as such is not maintainable as a summary suit. The contention of the Plaintiff that the suit is upon a bill of exchange was rejected.

Reference may also be made to the judgment in the case of The Central Railway Employees Co-operative Credit Society v. Bank of Baroda . In that case, the Plaintiff had issued crossed cheques for Rs. 1,75,000/- for short term deposit by the bank. The bank encashed the cheque but the amount of cheque was siphoned by the bank officials. A learned Single Judge whilst holding that a Summary Suit was maintainable, held that the Plaintiff society seeks to recover a debt payable by the Defendants bank with interest, arising on a written

contract. The Court held that to hold otherwise, would be to cause loss of faith and confidence of the business community and the ordinary citizens in the banking system. This however was not a case of honoured cheque.

27] From the above discussion it is clear that a summary suit would not lie on a settled account which is not confirmed by the Defendant and "on honoured cheque". Items (II) and (IV) of para 2 are answered accordingly.

(emphasis supplied)

33. Mr. Choudhary made an earnest endeavour to distinguish the aforesaid judgment on the premise that in view of the Bombay Amendment to Order 37, the summary suit to recover the debt or liquidated demand for money was maintainable. A brief legislative history of Order XXXVII Rule 2 would be apposite.

A.... Order XXXVII Rule 2, as originally enacted read as under:-

“All suits upon bills of exchange, hundies and promissory notes, may, in case the Plaintiff desires to proceed hereunder, be instituted by presenting the plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.”

B. The Bombay High Court amended Order XXXVII Rule 2(2) by a notification on 29.9.1936. The rule read as under:-

(1) All suits upon 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 contract express or implied, or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, or in suits in which the landlord seeks to recover possession of immovable property, with or without a claim for the rent or mesne profits against a tenant whose term has expired or has been duly determined by notice to quit, or as become liable to forfeiture for non-payment of rent or against persons claiming under such tenant may in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.”

C. By a further amendment dated 1st November, 1966 by Bombay High Court, the provisions of Order XXXVII Rule 2 of the Code was

substituted as under:-

“2. *Institution of Summary suits upon bills of exchange, etc.--*

(1) All suits upon 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 or 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 on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint with a specific averment therein that the suit is filed under this Order, and that no relief not falling within the ambit of this rule has been claimed, and with the inscription within brackets “(Under Order XXXVII of the Code of Civil Procedure, 1908)” just below the number of the suit in the title of the suit, but the summons shall be in Form No. 4, in Appendix B or in such other form as may be from time to time prescribed.”)

C. The Code of Civil Procedure, 1908, subsequently came to be amended by CPC Amendment Act, 1976 :- The provisions of Order 37 Rule 1(2), as amended by CPC Amendment Act, 1976, has been extracted above.

34. From a careful perusal of the successive amendments, it becomes evident that under the 1936 Amendment, the expression used was, “a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract *express or implied*.” However, under the 1966 Amendment, the expression used was, “arising on a written contract”. Two things, become clear. First by 1966 Amendment, the word “written” was prefixed before “contract”. Second, the words “express or implied” which found mention in 1936 Amendment, were deleted.

35. Thus, since 1966 amendment, the existence of a written contract for a recovery of a debt or liquidated demand in money is a

pre-condition if the summary suit is to be instituted to recover a debt or liquidated demand in money arising out of a contract. The Full Bench in the case of **Jyotsna Valia** (supra) enunciated that after 1996 Bombay Amendment and 1976 Amendment to the Code, the summary suit can only be filed if there be a written contract. The observations in paragraph 9 are material and hence extracted below:-

9. The terminology used in the Bombay amendment and the 1976 amendment to the Code of Civil Procedure, is similar. In answering the reference we shall consider the predicates of Order XXXVII under the Bombay amendment. The said rule itself provides that the debt or liquidated demand in money payable by the defendant, with or without interest, must arise on a written contract.

The rule before the 1966 Bombay amendment and the 1976 Central amendment to the Civil Procedure Code used the expression "arising on a contract express or implied" and this was substituted by the words "arising on a written contract". There can be therefore no dispute that after the 1966 Bombay amendment and the 1976 amendment to the Civil Procedure Code, the summary suit can only be filed if there be on a written contract. In other words, no Summary Suit can lie on an implied contract. There seems however some confusion as to the expression an implied contract and "implied terms in a written contract". The expression "implied term in a written contract" in law is distinct and different from an implied contract. We will consider this aspect of the matter whilst construing the legislative changes.

(emphasis supplied)

36. In view of aforesaid exposition of law, I find it rather difficult to accede to the submission of Mr. Choudhary that a suit for recovery of debt or liquidated demand in money, as such, is maintainable even in the absence of a written contract. The reliance by Mr. Choudhary on the decision in the case of **Gokuldas Podar** (supra), is misplaced.

37. In the said case, the Division Bench was considering the position as it obtained before 1966 Bombay Amendment. At that time, a summary suit to recover a debt or liquidated demand in money arising on a contract, express or implied, was tenable. The requirement of a written contract, and the deletion of the expression, “express or implied” was the result of 1966 Bombay Amendment, which position has since been continued under 1976 Amendment to the Code.

38. This propels me to the case based on the admission of liability. A clear admission of liability in writing may not present much difficulty. However, an acknowledgment of liability may be asserted in myriad forms. In such a situation, the nature of the document under which the defendant is alleged to have acknowledged debt or liability assumes critical salience. The Court has to pose unto itself a question, as to whether the document pressed into service as an acknowledgment in writing constitutes the acknowledgment of the debt or liability ?

39. Reverting to the facts of the case, in my considered view, the communication dated 18th March, 2020, could not have been read torn out of context and *de hors* the genesis of the dispute between the parties. Two factors assume significance.

40. One, the relationship between the parties, when the amount

was transferred from the account of defendant and Kamal.

41. In this context, the defendant has categorically asserted that Kamal was in control of her account as well and the corporate entity Kamya Forex and Gold India Private Limited. As noted above, the amount was instantaneously transferred from the joint account of the defendant and Kamal to the account of the said company. The defendant has, thus, as noted by the learned Judge also, raised a triable issue as to whether the said borrowing from the plaintiff and transfer thereof to the account of the company, was out of the own volition of the defendant.

42. Two, by an order dated 24th August, 2022 in Notice of Motion No. 2717 of 2021, the City Civil Court had declined to pass a decree on admission on the basis of the very email dated 18th March, 2020. The defendant has also explained the circumstances in which she was constrained to address the said communication to Kamal, namely the stand of Kamal in a proceeding under the Domestic Violence Act, 2005 that he had suffered loss in the said venture. Thus, the resignation from the post of the Director of the company and the demand for the refund of the share capital ought to have been appreciated in the aforesaid context.

43. At any rate, once the defendant raises a triable issue, ordinarily, an unconditional leave to defend the suit ought to be

granted. A useful reference, in this context can made to the judgment of the Supreme Court in the case of **B. L. Kashyap and Sons Ltd. vs. M/s. JMS Steels and Power Corporation and Another**⁵, In the said case, the Supreme Court culled out the principles in paragraph 33.3 as under:-

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.

(emphasis supplied)

44. The conspectus of aforesaid consideration is that the defendant deserves an unconditional leave to defend the suit. In the facts of the case at hand, a direction for deposit of even 25% of the sum of Rs. 13,23,000/- operates onerously, if viewed through the prism of the situation in life of the defendant. I am, therefore, impelled to interfere with the impugned order.

Hence, the following order.

ORDER

1 } The petition stands allowed.

5 (2022) 3 Supreme Court Cases 294.

2} The impugned order granting conditional leave to defend the suit stands quashed and set aside.

3} Unconditional leave to defend the suit is granted to the defendant.

4} The amount of Rs. 2,00,000/-, deposited by the petitioner-defendant pursuant to the order dated 13th November, 2024, be refunded to the defendant along with interest accrued thereon.

5} Rule made absolute in the aforesaid terms.

6} No costs.

Petition disposed.

(N. J. JAMADAR, J.)