

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4299 OF 2025

Avenue Shelters Pvt Ltd

..Petitioner

Versus

Constructive Concrete Constructions

...Respondent

Mr. Siddhesh Bhole, with Yakshay Chheda, Riddhi Natekar & Faizan
Shaikh, i/b Shreyas Vyas, for the Petitioner.

Mr. Reshant V Shah, i/b Lex Conseiller, for the Respondent.

CORAM: N. J. JAMADAR, J.

DATED : 15th APRIL 2025

P.C.:

- 1.** Heard the learned Counsel for the parties.
- 2.** The Petitioner-Defendant takes exception to an order dated 21st January 2025 passed by the learned Judge, City Civil Court in Summons for Judgment No. 238 of 2022, whereby leave to defend the Suit has been granted subject to the condition of deposit of 50% of the principal amount within 60 days of the said order.
- 3.** The Plaintiff was appointed as a contractor to execute the contract to build, "The Avenue". The terms of the contract were purportedly incorporated in the form of details of the work, the rate at which the contractor was to be paid and the schedule of

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payment etc, under the caption “Details of discussion and agreed terms for “THE AVENUE” building Between M/s Avenue Shelters Pvt Ltd & M/s Constructive Concrete Constructions.”

4. Initially the parties have agreed that the billing would be after each slab on the agreed percentage basis. 60% of the total payment within 15 days of the bill submission by payment in the form of cash or supply of material and 40% of balance payment in the form of assets. The Plaintiff claimed to have constructed the building in accordance with terms of the contract and raised the bills.

5. The Defendant allegedly committed default in the payment of the bills. The Plaintiff was thus constrained to institute the Suit, asserting that a sum of Rs. 61,78,465.46 out of the agreed consideration of Rs. 2,41,42,198, remained outstanding. In the intervening period, according to the Plaintiff, the Defendant had expressed his inability to deliver the constructed area of the building and had agreed to pay balance 40% of the consideration, in accordance with the terms of the contract, in cash. Hence, the Suit.

6. The Defendant appeared and filed an Affidavit seeking unconditional leave to defend the Suit. The Defendant contested

the existence of the contract, as such. It was denied that there was a default on the part of the Defendant in payment of the amount of the bills raised by the Plaintiff. In fact, the Plaintiff had abandoned the work and the Defendant was required to appoint another contractor to get the work completed.

7. By the impugned order, the learned Judge, City Civil Court, was persuaded to grant conditional leave. The learned Judge was of the view that in the audited balance-sheet for the year 2006-2007, there was an acknowledgment of liability to the tune of Rs. 1,34,36,778.38. The learned Judge also noted that the issue of Suit being barred by limitation was a triable issue and the Defendant had raised other triable issues. However, since the liability was admitted in the audited balance-sheet, the learned Judge was persuaded to grant conditional leave to defend the Suit subject to deposit of 50% of the principal amount.

8. The learned Counsel for the Petitioner submitted that the very tenability of the Suit, in the present form, as a Summary Suit is debatable. The Plaintiff has asserted that there was a novation of contract. There is no document to evidence the novation of contract between the parties. Resultantly, the Suit cannot be said to be based on a written contract.

9. The learned Counsel for the Respondent-Plaintiff controverted the submissions on behalf of the Petitioner. An endeavour was made to demonstrate that the various defences, raised by the Defendant were not only inconsistent but also mutually destructive. Laying emphasis on the audited balance-sheet, wherein a sum of Rs. 1,34,36,778.38 was shown to be outstanding towards the Plaintiff, the learned Counsel for the Respondent submitted that the impugned order does not warrant any interference.

10. In paragraph 7 of the Plaint, the Plaintiff has categorically asserted that the Defendant had expressed his inability to give the constructed area, in accordance with the terms of the contract, and agreed to pay balance 40% consideration in cash or by way of supply of material. This averment clearly constitutes a case of novation of contract. That brings in its trail the questions as to whether there was indeed novation of contract between the parties and what were the terms of such novation. *Prima face*, this claim of the Plaintiff takes the case out of the purview of Order 37 Rule 1(2) of the Code.

11. The learned Judge, City Civil Court has also recorded that the issue of limitation in view of the stand of the Plaintiff that

there was a payment on account of the liability, so as to extend the period of limitation, under Section 19 of the Limitation Act, 1963 was a triable issue. Similarly, the questions as to whether the bills were raised by the Plaintiff and the Defendant had allegedly discharged the entire liability were stated to be triable issue.

12. It is trite once triable issues are raised, ordinarily leave to defend has to be granted unconditionally. It is only when the Court entertains a doubt about the genuineness or bonafide of the defence raised by the Defendant, the Court can grant conditional leave to defend the suit (**B. L. Kashyap & Sons Ltd Vs M/s Jms Steels And Power Corporation & Anr¹**).

13. In the case at hand, the transactions are of the year 2004 to 2007. The Suit came to be instituted in the year 2010. The tenability of the Suit as a Summary Suit is debatable. Therefore, at this stage, it may be expedient to grant leave to defend on the condition of completion of the trial within a time-frame rather than that of deposit of amount.

14. I am, therefore, inclined to interfere with the impugned order to the said extent and party allow the Petition.

15. Hence the following order:

¹ (2022) 3 SCC 294.

: O R D E R :

- (i) The Petition stands partly allowed.
- (ii) The impugned order, to the extent, it grants leave to defend the Suit on the condition of deposit of 50% of the principal amount, stands quashed and set aside.
- (iii) Leave to defend the Suit is granted to the Defendant on the condition that the Trial be completed within a time-frame.
- (iv) The Defendant shall file Written Statement within a period of 30 days from today.
- (v) The trial be concluded as expeditiously as possible and preferably within a period of 9 months from the date of filing of the Written Statement by the Defendant.
- (vi) No costs.
- (vii) Petition disposed.

[N. J. JAMADAR, J.]