



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4325 OF 2025**

M/s. Neminath Realty and Ors. ... Petitioners
versus
Razia Abbas Hetavkar and Ors. ... Respondent

Mr. Pradeep Thorat i/by Ms. Eventa A. Gonsalves and Mr. Reyden L. Gonsalves, for Petitioners.

Mr. Naushad Engineer, Sr. Advocate with Mr. Zishan Quazi, Mr. Harsh Murjani i/by Mr. Mayur Kohite, for Respondent Nos.1 to 3.

CORAM: N.J.JAMADAR, J.

DATE : 8 APRIL 2025

P.C.

1. Heard the learned Counsel for the parties.
2. The challenge in this Petition is to an order dated 4 February 2025 passed by the learned Judge, City Civil Court, Greater Bombay, in Commercial Suit No.378 of 2021, whereby the learned Judge has granted leave to defend the suit to the Petitioners, subject to the Petitioner's depositing the amount of Rs.40 Lakhs.
3. The Petitioners are the developers. The Petitioners entered into an agreement for development of the property situated at Survey No.97, New Survey No.16331 of Mazgaon Division, Mumbai. Under the terms of the development agreement, in addition to the monetary consideration, the Petitioners had agreed to provide 10 flats to the holders of the property. Those flats were to be provided within a period of six years from the date of the

execution of the said agreement. The parties had further agreed that, in the event those flats were not delivered, the developer shall be liable to pay compensation to the owner @ Rs.5 lakhs per flat per annum with 10% escalation per year for the period of delay in handing over the flats. There was also a stipulation for payment of the property taxes by the developer.

4. Alleging that there was default on the part of the developer in delivering possession of the flats as agreed and in payment of the taxes and outgoings, the Respondents instituted a suit seeking recovery of a sum of Rs.43,41,921/-. The suit was instituted on the premise that the liability arose out of the written contract contained in the development agreement.

5. By the impugned order, the learned Judge, City Civil Court, was persuaded to grant leave to defend the suit subject to deposit of a sum of Rs.40 Lakhs. The learned Judge, City Civil Court was of the view that as the Defendants had admitted the liability to pay the amount of compensation in the event of delay in delivery of possession of the subject flats, the judgment of the Supreme Court in the case of IDBI Trusteeship Services Limited V/s. Hubtown Limited¹, governed the fact situation.

6. Mr. Thorat, the learned Counsel for the Petitioners, submitted that the very tenability of the suit as a summary suit is debatable. At any rate, there is no admission of liability. At best, the suit can be for damages for the breach of

1 (2017) 1 SCC 568

the contract, which has also been terminated before taking out Summons for Judgment.

7. Mr. Engineer, learned Senior Advocate for the Respondents, controverted the submissions on behalf of the Petitioners. Taking the Court through the Development Agreement, an endeavour was made to demonstrate that the suit in the present form was maintainable as the Summary Suit was on the basis of the stipulations in the Development Agreement.

8. I have perused the stipulations in the Development Agreement. Clause 23 of the Development Agreement which forms the basis of the suit, reads as under :

“23. It is agreed that in the event construction work is not completed within the stipulated period of SIX YEARS from the date of execution of this agreement, the developer shall be liable to pay compensation to the owners a sum of Rs.5,00,000/- (Rupees Five Lakhs only) per flat per annum, with 10% escalation per year for the period of delay in handing over the respective flats. The said amount is payable at the stage of each year since the above lapse within 45 days.”

9. A bare perusal of the aforesaid clause would indicate that it is in the nature of a sum named by the parties to be paid in the event of breach of contract. Such a stipulation would clearly fall within the ambit of Section 74 of the Indian Contract Act, 1872. In such a situation, the Court would be

empowered to award damages not exceeding the sum named in the contract. Thus, the question as to whether the sum named constitutes the liquidated damages or is in the nature of penalty would warrant adjudication at the trial. The Court would be first required to decide as to which of the parties has committed the breach of contract.

10. Once it was found that a triable issue was raised, ordinarily the Court is required to grant an unconditional leave to defend the suit, unless there is a clear admission of the liability. In the facts of the case, the learned Judge, City Civil Court has considered the stipulation for payment of compensation as an admission of liability, quite unjustifiably. In these circumstances, the learned Judge, City Civil Court could not have granted leave to defend the suit upon the deposit of Rs.40 Lakhs, with liberty to the Plaintiffs to withdraw the said amount. Resultantly, the impugned order deserves to be quashed and set aside.

11. Mr. Engineer, learned Senior Advocate for the Respondents – Plaintiffs submitted that the suit was initially instituted in the year 2018. The Defendants had not appeared and the suit was decreed ex-parte on 2 December 2021. Thereafter, the said ex-parte decree came to be set aside. In these circumstances, the trial of the suit be expedited.

12. The submission is justifiable.

13. Hence, the following order :

ORDER

- (i) The Writ Petition stands allowed.
- (ii) The impugned order to the extent it grants leave to defend the suit subject to deposit of Rs.40 Lakhs in the Court, stands quashed and set aside.
- (iii) The Petitioners-Defendants are granted unconditional leave to defend the suit.
- (iv) The Defendants shall file written statement within a period of 30 days from the date of uploading of this order.
- (v) The trial in Commercial Suit No.378 of 2021 stands expedited.
- (vi) Learned Judge, City Civil Court is requested to make an endeavour to hear and decide the said suit as expeditiously as possible and preferably within a period of one year from the date stipulated for filing the written statement of the Defendants.
- (vii) The parties shall co-operate with the learned Judge, City Civil Court, in the expeditious disposal of the suit and shall not seek unnecessary adjournments.
- (viii) No costs.

(N.J.JAMADAR, J.)