

(1999) 03 BOM CK 0110

In the Bombay High Court

Case No : Summons for Judgment No. 662 of 1994 in Summary Suit No. 2289 of 1993

BOI Finance Limited

APPELLANT

Vs

Padma Alloy Casting Private Ltd. and others

RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 220(4), 227

Bombay Stamp Act, 1958 — Article 37, 5, 53

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 2, Order 37 Rule 3, 34

Companies Act, 1956 — Section 446(2)

Contract Act, 1872 — Section 10, 126

Citation : AIR 1999 Bom 340 : (1999) 3 ALLMR 376 : (1999) 4 BomCR 218 : (1999) 2 BOMLR 744

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Mrs. Ferzana Z. Behramkamdin and Ms. Bhakti Popat, instructed by Wadia Ghandy and Co, for the Appellant; D.H. Mehta, instructed by Womoncar and S. Shah, instructed by Mansukhlal Hiralal and Co., for the Respondent

Judgement

F.I. Rebello, J.—Plaintiffs in the present summary suit have applied for summons for judgment on the ground that there are no triable issues arising from the defences taken by the defendants and consequently suit be decreed in favour of the plaintiffs. In the present summary suit, the defendant No. 1 company have not applied for leave to defend. However, defendants Nos. 2 and 3 who are said to be guarantors have so applied. Defendants Nos. 2 and 3 have pointed out that there is no written agreement by the defendant with the plaintiff and at any rate the receipt issued by defendant No. 1 is not an agreement based on which a summary suit could have been filed nor was the receipt properly stamped and consequently inadmissible in evidence. It is, therefore, contended that leave to defend should also be granted in favour of defendant No. 1. The Court, it is pointed out, must also prima facie, come to the conclusion that the suit is

maintainable as a summary suit even though defendant No. 1 has not applied for leave to defend. On this background/few facts need to be stated.

2. It is the case of the plaintiffs-Bank that the Board of Directors of defendant No. 1 by resolution dated 8th May 1990 resolved to accept intercorporate Deposit from the plaintiff-Bank for a period of 181 days as per terms and conditions decided by the plaintiffs. The plaintiff, thereafter advanced the said sum in respect of which defendant No. 1 issued stamped receipt dated 17-5-1990. Under that receipt, defendant No. 1 accepted that they have received from the plaintiff a sum of Rs. 50 Lacs on account of Intercorporate Deposit for 181 days with interest rate of 18% per annum with quarterly rests. By another document dated 16-5-1990, styled as undertaking, defendant No. 1 agreed to pay principal amount with interest at the rate of 18% p.a. (quarterly rest) on due dates. Defendants Nos. 2 and 3 on 16-5-1990 by an agreement of guarantee stood as guarantors. By virtue of the said guarantee which is typed on a stamp paper of Rs. 10/-, defendant No. 2 agreed that they would make payment on default being committed by defendant No. 1. It is the case of the plaintiffs that thereafter as defendants No. 1 failed to pay the said amount they issued notices to defendant No. 1 as well as defendant Nos. 2 & 3 which have been duly received by them. In spite of that, amount has not been paid. Exhibit G to the plaint is particulars of claim which shows the principal amount due by the defendants to the plaintiff as Rs. 50,00,000/-; interest on the said amount from 16th August 1990 to 21st June 1993 as Rs. 32,64,141.50 and as such the total amount due and payable is Rs. 82,64,141.50. Plaintiffs claim further interest on the said amount at the rate of 18% p.a with quarterly rest from 22nd June 1993 till payment and/or realization. The plaintiffs on appearance being filed on behalf of defendants No. 2 and 3 have thereafter moved this Summons for Judgment. There is a provisional liquidator appointed for defendant No. 1 company.

3. Defendants Nos. 2 and 3 have filed affidavit opposing this Summons for Judgment. In the affidavit filled by defendant No. 2, it is contended that the suit is not maintainable as the petition for winding up of the Company has been admitted and consequently permission of the Company Court was required u/s 446(2) of the Companies Act. It is further stated that plaintiffs have sought reliefs which fall outside the purview of Order 37, Rule 2 of the Civil Procedure Code, and as such the suit is not maintainable. The suit, it is contended, was filed on 22nd June 1993 and summons for Judgment was taken out on 9th November 1994. In view of that, it is pointed out, defendants are entitled to unconditional leave to defend the suit on that ground alone. It is then contended that guarantee was executed by defendant No. 2 in his capacity as Director of the Company and said guarantee, it is alleged, is not valid and enforceable as the same was executed on stamp paper of Rs. 10/- only and as such, the guarantee is not properly stamped. Plaintiffs therefore are not entitled to claim any amount based on the said guarantee. It is then pointed out that interest is not payable at the rate of 18% p.a with (quarterly rests) as per the guarantee. It is then again contended that there is no written contract based on which suit could be filed

under Order 37, Rule 2 of the CPC and hence the alleged guarantee is not enforceable in law and consequently also, the suit could not be filed under the provisions of Order 37, Rule 2, In view of that, it is contended that this Court should grant unconditional leave to the defendant.

Defendant No. 3 has also filed his affidavit. Defences raised by him are more or less similar as that of defendant No. 2. It is the contention of this defendant that guarantee is not properly stamped and as such cannot be received in evidence. The Bank guarantee when signed, was on a blank form and it was filled in by the plaintiffs after signing by the defendant, as such guarantee is not binding on the defendants. It is further contended that no notice was served on the defendants invoking the guarantee as no notice was served at the address given at the foot of the Bank guarantee as required by the guarantee. The plaintiffs, it is pointed out, has not produced any books of accounts nor any copy of the accounts maintained and as such, also suit is not maintainable. The claim for interest, it is contended, is not based on any contract nor any agreement and consequently suit is not maintainable.

4. At the hearing of the summons for Judgment, learned Counsel have elaborated on the aforesaid points and also produced judgments in support thereof. On behalf of the plaintiffs, learned Counsel contended that defences raised are neither legal nor valid and consequently, there are no triable issues that arise and as such summons for Judgment be made absolute.

Learned Counsels have relied on various judgments which will be referred to hereinafter.

5. Before proceeding to discuss the contentions and judgments, the points which according to me, need to be decided may also be formulated. They would be as follows:

(a) Whether decree can be passed against defendant No. 1 in the absence of defendant No. 1 applying for leave to defend;

(b) Whether suit as filed against defendants No. 2 and 3 and reliefs prayed for therein can be said to be falling under Order 37 of the C.P.C.?

(c) Whether resolution passed by Board of Directors of defendant No. 1, the receipt of payment and the undertaking constitute a written agreement and as such suit against defendant No. 1 is maintainable? Additionally is the receipt properly stamped.

(d) Whether guarantee given by defendants No. 2 and 3 is properly stamped and if not properly stamped, can the plaintiffs be permitted to pay fine and Additional Fees and remove the defect and consequently whether the Court can decree the suit?

(e) Whether guarantee given by defendants No. 2 and 3 was as Directors or in their personal capacity?

(f) Whether notice on defendant No. 3 was not as required in terms of the guarantee? and whether when he signed the guarantee the name of defendant No. 1 was not written on the guarantee?

(g) Whether on account of delay in moving Summons for Judgment, by reading Rule 227 of the High Court (O.S.) Rules, defendants are entitled to unconditional leave to defend?

(h) Whether the suit against defendant No. 1 is not maintainable by virtue of section 446(2) of the Companies Act?

6. Order 37, Rule 1 of the C.P.C., as amended by our High Court reads as under :

"R.1 (i) This order shall apply to the following courts, namely:-

(a) High Courts, City Civil Courts and Courts of Small Causes; and

(b) Such other courts as may be specifically empowered in this behalf by the High Court from time to time by a Notification in the Official Gazette:

Provided that in respect of the courts referred to in the clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper and may also from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary the categories of suits to be brought under the operation of this Order as it deems proper." (1-10-1983) and (1-10-1987)."

Rule 2(1) of Order 37 C.P.C. reads 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 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."

It would, therefore, be relevant to discuss the scope and ambit of Order 37, Rule 2(1).

Order 37 as it then stood came up for consideration before the Apex Court in the case of *Milkhiram (India) Private Ltd. and Others Vs. Chamanlal Bros.*, . It was the case of the plaintiffs in the said case that he had advanced monies to the

defendant from time to time and had obtained promissory notes. Subsequently, on account of political and economic conditions in India the agreement entered into was revised by the plaintiff. Plaintiff called on the defendant to repay the amount. The plaintiffs thereafter obtained leave and reserved their claim based upon agreement, before they took out summons against the defendant under Order 37, Rule 2(2) and in that context the Apex Court considered sub-rules (2) and (3) of Order 37 as amended by this Court as they then stood. The Apex Court referred to its earlier judgment in the case of Santosh Kumar Vs. Bhai Mool Singh, . The Court had observed therein that in granting leave to defend, what the Court must find out is whether defence raised is real and not sham, in the sense that if facts alleged by the defendant are established, there would be a good or even plausible defence on those facts. If the Court is satisfied about that, leave must be granted unconditionally. In that case, the Court held that trial Court was wrong in imposing conditions about giving security on the ground that documentary evidence had not been adduced by the defendant. The Court held that stage of proof can only arise, after leave has been granted and omission to adduce documentary evidence would not justify inference. The defence sought to be raised was vague and not bona fide. Thereafter, the observation of Bose, J., were reproduced which read as under:

"Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interest of trade and commerce. In general, therefore, the test is to see whether the defence raises 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."

The Apex Court thereafter observed as under:

"Whether the defences raises a triable issue or not has to be ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the Court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of Order 37 which have been enacted, as rightly pointed out by Bose, J., to ensure speedy decision in cases of certain types. It will be seen that Order 37, Rule 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be subjected to a condition."

7. The law pertaining to leave to defend has been summarised by the Apex Court

in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . The same principles have been reiterated in M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd., . The position of law as summarised is as under:

(a) If the defendant satisfies the Court that he has as good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts may be sufficient to entitled him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiffs claim the Court may impose conditions at the time of granting leave to defend - the conditions being as to time of trial or mode of trial but not as to payment in to Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.

The need to reproduce these well-known principles arise as several judgments of Single Judges of this Court have been cited where on failure on the part of plaintiffs to take out summons for Judgment under Rule 227 of the O.S. Rules within six months unconditional leave to defend has been granted except by Vyas, J. Most of those judgments have followed the view taken by Mody, J., in Central Bank of India Vs. Femme Pharma Ltd. and Others, .

8. With the above background, the contentions which have to be decided can be dealt with, not necessarily in the order in which they have been referred to earlier.

The first contention is whether a decree can be passed against defendant No. 1 in the absence of defendant No. 1 applying for leave to defend. It has been contended by defendant No. 2 and 3 that the Court must come to a conclusion that it is a summary suit, to pass a decree. If the Court does not come to that conclusion then merely because the suit is styled and filed as a suit under Order 37 and defendant chooses not to apply for leave to defend, cannot result in decree being passed against defendant No. 1. In the instant case, it is contended that defendants Nos. 2 and 3 have been sued as guarantors. It is only in the event that a decree can be passed against defendant No. 1 or suit is maintainable against defendant No. 1 would the suit be triable against defendants No. 2 and 3 irrespective of the fact that suit under guarantee could

have been filed against defendants Nos. 2 and 3 also. It has also been contended that the plaintiffs seek to rely on a receipt which is not properly stamped and such receipt cannot be taken in evidence and consequently, there was no agreement in writing and provisions of Order 37, Rule 2 will not be attracted. It will, therefore, have to be firstly seen whether receipt on which is affixed a 20 paise stamp has been properly stamped and if so, whether it is admissible in evidence. Counsel for the plaintiffs has drawn my attention to the provisions of the Bombay Stamps Act read with provisions of the Indian Stamps Act. So read together, it is pointed out that receipt would be covered by Article No. 53. Receipt on the date when it was issued the stamp fee to be charged was 20 paise. Consequently, the argument that receipt has not been properly stamped has to be rejected. Receipt can therefore, be taken in evidence and considered. That still leaves the question as to whether there is written agreement between the parties. It is now accepted principle that agreement in writing need not necessarily mean document appending signatures of both the parties. Document accepted or exchanged by and between the parties by themselves can be construed to be an agreement in writing. In the present case, firstly there is a resolution passed by the Board of Directors of defendant No. 1 to accept intercorporate deposit on terms and conditions. Secondly, receipt by defendant No. 1 admits receipt of payment and agreeing to pay the amount in terms of the receipt issued which includes interest at the rate of 18 % p.a. (quarterly rest). So also, undertaking, given by defendant No. 1 to make payment on the due date with interest on terms already set out above. In the light of the documents exchanged between the parties, in my opinion there is an agreement in writing between the parties. View which I have taken is also the view taken by this Court in an earlier judgment. This view was taken in the case of *M/s. Manekchand Mokhanlal Poonawala v. Shah Bhimji Kundanmal*, reported in 71 Bom.L.R. 370 and an unreported judgment in Summons for Judgment No. 23 of 1976 in Suit No. 1405 of 1975 *Jaishree Chemicals v. Esskay Dyeing and Printing Works*, dated 9th April 1976 by K. Desai, J. This is also view taken in Civil Revision Application No. 366 of 1969 with C.R.A. No. 337 of 1969 in order passed by Vyas, J., on 23rd February 1970. Counsel also brought to my notice certain other decisions which need not be referred to in view of consistent judgments of this Court. To my mind, therefore, there is agreement in writing between the parties and as such, suit as filed by plaintiff against defendant No. 1 is maintainable as a summary suit. Once it is held to be a suit falling within the predicate of Order 37 in the absence of affidavit for leave to defend, decree must follow.

Issue as to decree will be decided while disposing of the other contentions raised on behalf of defendants Nos. 2 and 3. This will dispose of contentions (a) and (c).

9. The next major contention which needs to be considered is whether Deed of guarantee has been properly stamped and if so, whether it can be considered as a guarantee as contemplated by amendment made by this Court to Order 37, Rule 3. The contention of defendants Nos. 2 and 3 is that document has not been properly stamped in terms of the provisions of the Bombay Stamps Act, 1958.

The guarantee was executed on 16th May 1990. What would be applicable would be Article 37 of the Bombay Stamp Act. Article 37 of the Bombay Stamp Act makes the stamp fee payable on the letter of guarantee same as on agreement in writing under Article 5. Article 5 provides that where instrument is not covered by Article 5(a) to (h) stamp duty payable is Rs. 10/-. As such, duty has been properly paid and contention of the defendants that document is not properly stamped need not be considered and has to be rejected. In view of the rejection of the said contention, I see no reason why I should consider the judgment in *Yogendra Patwardhan Vs. Khandelwal Hermann Electronics Ltd.*, . In that case, the learned Single Judge of this Court was considering a case of an undertaking which was not properly stamped. The learned Judge held that if document was not properly stamped, summary suit could not be filed on facts of the case. As I have earlier pointed out, document in the present case is properly stamped and defendants Nos. 2 and 3 could have been sued on the guarantee alone. It is no doubt true that Counsel for the plaintiffs sought to distinguish said judgment by relying upon judgment in *Shankar Narayan Vaikar v. Triumbak Narayan Vaikar*, reported in 48 Bom.L.R. 622 and judgment of the Lahore High Court in the case of *Narain Datt. v. Kirpa Kishen*, reported in AIR 1932 Lah 616. Those judgments are however distinguishable as they were not based on summary procedure, but regular suits wherein plaintiffs could be called upon to pay require balance fees and fine, whereupon the documents could be taken on record and the Court could proceed to pass decree. Therefore contention (d) must be rejected.

10. Defendant No. 3 also raised contention that signature was taken on blank forms and further no notice was given to him on the address given on the Bank guarantee. Defendant No. 3 does not deny his signature on the document. According to him, there were blanks in the guarantee, which were filled in thereafter. The name of Padma Alloy Casting Pvt. Ltd. and the date of guarantee was filled in thereafter. Defendant Nos. 2 and 3 had signed as guarantors on the guarantee form. Loan was taken by defendant No. 1. Defendants Nos. 2 and 3 at the relevant time were Directors of defendant No. 1 and had agreed to give their personal guarantees in terms of resolution at Ex. A (Collectively). Contention (e) must be rejected.

Then comes the question of notice. It is now well settled that failure to give notice at the address specified, the person aggrieved must show prejudice occasioned by such failure. In the instant case, the plaintiff has averred and this has not been denied by the defendant that letter was sent and duly received on behalf of the defendant invoking guarantee by the plaintiff. The fact remains that letter addressed to defendant No. 3 invoking the guarantee was not sent at the address specified in the guarantee. There is no material to show that it was personally received by him. The material is that the letter addressed at the office of defendant No. 1, was received there by someone. The effect of these defences will be considered whilst considering whether leave to defend can be granted or not or with conditions.

11. The next contention which was seriously argued and in support of which a number of judgments were cited is about the scope of Rule 227 of the High Court O.S. Rules. Counsel for defendants have pointed a large number of judgments starting with Central Bank of India Vs. Femme Pharma Ltd. and Others, . In that case, in Summons for Judgment, it was contended suit must be dismissed on failure to comply with requirement of Rule 227 of the High Court O.S. Rules 1980 corresponding to Rule 220(4) of the Rules 1957. The Court rejected the said contention on the ground that it had wider discretion after the original rule had been amended and at any rate Summons for Judgment has been taken out even before matter could be notified or placed on board for dismissal. Thereafter, there are observations made in para 4 that as Summons for Judgment has been taken out after much delay, unconditional leave to defend was granted. There is no reason for the said observation in the judgment which can be said to be ratio decidendi of the judgment. Even otherwise the issue before the Court was whether Rule 227 of O.S. Rules gave any discretion to the Court not to dismiss the suit if Summons for Judgment had not been applied for within the time set out. Even otherwise it can be said to be the ratio decidendi of the judgment, if it was directly in issue, the issue need to have been decided and there are reasons. To my mind none of the aforesaid tests are satisfied. The said view seems to have been followed by various learned Single Judges. I do not propose to refer to them except in the case of Summons for Judgment No. 748 of 1996 in Summary Suit No. 4283 1995 decided by Nijjar, J. The learned Judge seems to have taken the same view and also relied upon observations made by the Division Bench of this Court in the case of M/s. Randerian & Singh (Pvt.) Ltd. v. Indian Overseas Bank, in Appeal No. 1060 in Summons for Judgment No. 307 of 1986 in Summary Suit No. 3212 of 1985. Purported reference is made in that judgment to overcome another judgment by Vyas, J., in Bank of Maharashtra v. S.B. Joshi, in Summons for Judgment No. 731 of 1991 in Suit No. 2684 of 1990 who had taken a contrary view. According to the learned Single Judge in view of the view taken by the Division Bench the view of Vyas, J., is not good law. I am unable to agree with the learned Single Judge. In Randerian & Singh (Pvt.) Ltd. (supra), the issue before the Division Bench was whether the relief of 16.5% interest claimed as a relief was warranted by the contract or under a statutory provision. The Division Bench held that if the relief prayed for was not warranted by the contract or under a statutory provision, the relief could not be claimed in a summary suit. In such an event the Court had to grant unconditional leave to defend or plaintiff could apply for withdrawal of Summons for Judgment to apply afresh after amending the plaint and dropping the relief which was not maintainable. I would also not be in agreement with the view taken by various Single Judges of this Court holding that if there is delay in taking out Summons for Judgment unconditional leave to defend may be granted as a matter of course. Under Rule 227 of the High Court (O.S.) Rules in the event after filing of summary suit, the plaintiff does not move within six months and apply for summons for judgment, discretion is given to the Court, to dismiss the suit. Nowhere on reading or construction of the said Rule, can it be construed that if

suit could be dismissed it must follow that the defendant, who may have no defence in terms of the judgment of the Apex Court in the case of M/s. Machalec Engineering (supra) has a right of getting unconditional leave. In the ordinary course, I would have referred the matter to a larger Bench for decision in view of the conflicting decisions between Vyas, J., and other Single Judges. As pointed out earlier, however, the view taken by Nijjar, J., that the view has been affirmed by the Division Bench does not find support from that case. The view has not taken into consideration the law laid down by the Apex Court and further relies on the judgment of Mody, J., in Central Bank of India (supra), which I have explained. Therefore, the contention as raised on behalf of defendants Nos. 2 and 3 that they are entitled as a matter of course for leave to defend as summons for judgment had not been taken out within six months has to be rejected. Leave to defend as held by the Apex Court, is based on the defences which are disclosed in the affidavit in support of leave to defend. Unless, apart from that, there is a statutory provision which adds to the defences, in my opinion, Rule 227 cannot be pressed to provide for a defence not provided for either in construction of Rule 227 of the Rules or by the law laid down by the Apex Court. Contention (g) is, therefore, rejected.

12. That takes us to other contention which has been seriously argued viz. one of the reliefs as prayed for cannot be granted in a summary suit. For that purpose, the prayer clause need to be reproduced. Prayer clause reads as under:

"that the defendants jointly and/or severally be ordered and decreed to pay to the plaintiffs the sum of Rs. 82,64,141.50 as on 21st June 1993 together with further interest thereon at the rate of 18% p.a. with quarterly rests from 22nd June 1993 till payment and/or realization as per particulars of claim Exhibit "G" hereto."

13. As per particulars of claim the plaintiffs had calculated interest at the rate of 18 % p.a. compounded with quarterly rests. Contention of defendants Nos. 2 and 3 is that there is no agreement in writing between plaintiffs and defendants Nos. 2 and 3 for compounding of interest. It is, therefore, contended that reliefs prayed for against defendants Nos. 2 and 3 not being under any document or agreement or writing, suit itself is not maintainable as a summary suit. Reliance for that purpose is placed on a judgment of this Court in Randerian & Singh Ltd. v. Indian Overseas Bank, in Appeal No. 1060 of 1986 in Summons for Judgment No. 307 of 1986 in Summary Suit No. 3212 of 1985. A Division Bench of this Court was considering an appeal where conditional leave to defend was granted to the defendants and appeal preferred against the said order was before the Division Bench. It was contended therein that interest had been claimed at 16.5 % in the body of the plaint and in the prayer clause. The suit was based on a promissory note and bill of exchange. The Bank at the hearing restricted its claim for interest at the rate at 6% p.a. The Division Bench observed as under:--

"Under the Rules of this Court strict conditions are imposed on the defendants in a summary suit. They must file their appearance in Court within a short specified

period and failure to do so entitles the plaintiffs to obtain an ex-parte decree against them. It must logically follow that there must be equally stringent requirements postulated on the plaintiffs. One of those requirements would be that they must not in the suit make a claim not warranted by the contract or under a statutory provision. If it can be demonstrated, as it can be in the instant case, that the plaintiffs have in the plaint made a claim for interest not warranted by the statutory provision or by the contractual document, then the suit must be one which cannot be accepted as a summary suit. If this can be done, it would follow that plaintiffs have filed as summary suit a suit which was not really a summary suit. Once this is demonstrated, one of the consequences must follow. The first and the more obvious is to grant to defendants unconditional leave to defend the suit and transfer the same to the appropriate cause list-long cause, short cause or commercial cause. The present case would fall in the last category. There is another way open and that is for the plaintiffs who are faced with such defences in the affidavits made on the Summons for Judgment with liberty to take out fresh Summons for Judgment after amending the plaint and putting their house in order."

The Court did not agree with the argument that at the hearing that the plaintiff could orally give up or reduce the interest.

This view was followed by another Division Bench in case of Hydraulic and General Engineering Ltd. & another v. U.C.O. Bank, reported in 1998 I.L.J. 793. The Division Bench held that on reading the plaint and counter guarantee, they were of the clear opinion that the claim for interest as included in the plaint was not justified in a summary suit.

14. On the other hand on behalf of the plaintiffs, it contended that defendants had agreed to pay an amount of Ra. 50 Lacs together with interest thereon at the rate of 18% p.a. or at such other rate of interest which may be then be payable by the principal (including in particular interest at an additional or penal rate in the event of default by principal in punctual payment or any installment and/or of interest). It is, therefore, contended that by agreeing to this clause, defendants Nos. 2 & 3 had agreed to pay at additional or penal rate in the event of default by principal in punctual payment. It is, therefore, sought to be contended that defendants had agreed to pay interest at quarterly rests. For this reason, it is pointed out that leave to defend or at any rate unconditional leave cannot be granted. Reliance is also placed on the observations made by the Apex Court in *Milkhiram* case and observations by another Single Judge of this Court in *Banque Indosuez v. M/s. Neptune Exports & others*, in Summons for Judgment No. 516 of 1997 in Summary Suit No. 813 of 1997 decided on 8th February 1999. It is held that even if Court comes to the conclusion that there is dispute in so far as interest is concerned, at the highest, conditional leave would be granted in so far interest is concerned, but so far as principal and other amounts are concerned has to be deposited. That, according to the learned Counsel, is observation of the learned Single Judge in *Banque Indosuez*. In my opinion, the

observations in Banque Indosuez if sought to be construed in the manner sought to be construed would run counter to the Division Bench decision referred to earlier in Randerian & Singh Pvt. Ltd. reproduced earlier though in Milkhiram (India) P. Ltd. (supra), considering Order 37 as it stood before its amendment the Apex Court has observed that it is left to the discretion of the Trial Judge. Therefore, what will have to be examined is whether contention of the plaintiffs that the defendants had agreed to pay additional interest and contention of defendants Nos. 2 and 3 that there is no provision for payment of compound interest with quarterly rests is provided for or not. Answer lies therein.

15. The expression used in the guarantee is "such other rate of interest which may then be payable by the principal". In the bracket are also used expression including "interest at additional or penal rate" on default by the principal in punctual payment of any installment and/or interest". What Counsel contends is that this clause must be read to mean and include also interest with quarterly rest. This document was signed purportedly on 16th May 1990. I say purportedly as the date is handwritten unlike the rest of the terms which are typed. The amount was paid by the plaintiffs to defendant No. 2 vide cheque dated 17-5-1990 and it provides for interest at 18% p.a. with quarterly rest (compounded quarterly). Therefore, the question will arise whether the expression "such additional interest" includes interest with quarterly rest (compounded quarterly). As pointed out earlier, the suit is a summary suit. Plaintiff is asking for summons for judgment based on a document. As observed by the Division Bench in M/s Randerian & Singh Pvt. Ltd. (supra) once defendant is subject to strict terms equally plaintiffs must be put to stringent terms. The receipt and undertaking contemplate that in the event defendant fails to pay installment on the due dates then interest thereon as may be due will be compounded quarterly and added to the principal. Therefore, it is not additional interest but interest which is capitalised. Considering the above, in my opinion, the expression "additional or penal interest" would not cover a case of interest with quarterly rest (compounded quarterly). What the receipt and undertaking provide is that interest would be capitalised if installment is not paid on time. This would not fall within the expression "additional or penal interest". The expression additional interest would mean a higher rate of interest than what was agreed. Capitalization of interest would not mean additional interest. It would be interest at the same rate but on an increased capital. Penal interest normally understood is additional interest on defaulted interest payment. That is not in issue. Once I so hold then the ratio of the Division Bench judgments cited earlier will have to be applied and once so applied the suit presently filed against defendants Nos. 2 and 3 as summary suit would not be maintainable considering the prayer clause for interest. Suit will have to be relegated so far as defendants Nos. 2 and 3 are concerned, to be tried as commercial suit. The contention of defendant No. 3 that the handwritten portion was interpolated later on would also have a bearing on the interest to be charged as the expression is additional interest. Additional interest can only mean additional interest after the document

was executed and not on the same day or earlier. Say if the agreement, with defendant No. 1 is on 17th, if the guarantee is of the same day or the earlier day, then the expression additional interest would mean additional interest after 17th. In the instant case no additional interest is claimed after 17th, but interest as of 17th at 18% with quarterly rests.

16. An additional argument was raised that as provisional liquidator had been appointed in proceedings for winding up, the suit was not maintainable u/s 446(2) of the Companies Act. In the light of language of section 446(2) it is clear that there is no merit in the said contention. Permission u/s 446(2) would be required in the event winding up order is made or after liquidator is appointed. In the present case, suit was filed before Provisional Liquidator was appointed and consequently no leave is required. This view is also the view taken by Dhanuka, J., Bank of Maharashtra v. Padma Alloy Castings Ltd., in Notice of Motion No. 466 of 1995 in Suit No. 4765 of 1994 with Company Application No. 561 of 1995 in Company Petition No. 467 of 1993 decided on 16th November 1991.

17. The plaintiff along with list of documents has produced a certified copy of the resolution of the Board of Directors of Padma Alloy Casting P. Ltd., a receipt signed by the Director of Padma Alloy Casting P. Ltd. and undertaking signed by Director of Padma Alloy Casting P. Ltd.; Deed of Guarantee dated 16th May 1990; duplicate copy of letter dated 20th March 1993 along with A.D. as also letter dated 7th August 1992 along with 2 A.Ds.; letter dated 23rd December 1992 signed by Director of defendant No. 1; another letter dated 28-1-1993 written by Director of defendant No. 1; letter dated 16-2-1993 by the Director to Mr. M.L. Shah. The same are taken on record and marked Exh-A (collectively) except the Deed of Guarantee which is disputed. It will have to be proved.

Xerox copy of Gulf News tendered in evidence is rejected at this stage as no case is made out that the primary evidence is not available and that the copy produced falls within secondary evidence.

From the pleadings in the plaint, documents produced in support thereof, finding that there is agreement between the parties and also failure by defendant No. 1 to oppose Summons for Judgment, suit decreed against defendant No. 1.

In the light of that following order:

(i) Suit decreed against defendant No. 1 in terms of prayer (a).

(ii) Defendants Nos. 2 and 3 are given unconditional leave to defend the suit. Defendants Nos. 2 and 3 are granted 12 weeks time from today to file written statement.

Parties will file affidavits of document within 8 weeks from today. Thereafter inspection and discovery will be completed within 8 weeks thereafter.

Suit is transferred to the list of Commercial Causes.

18. Suit decreed with direction.